Supreme Court, U.S.
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No. 97-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

VISTA PAINT CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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May 26, 1998

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QUESTIONS PRESENTED

1. Whether the lower courts erred in holding that § 307(b)(2) of the Clean Air Act precludes a defendant in a civil enforcement action from challenging the validity of the regulation being enforced.

2. Whether the lower courts erred in holding that the Government does not bear the burden of proof for purposes of penalty fact-finding under § 113(e)(1) of the Clean Air Act.

3. Whether the lower courts erred in holding that a summary "trial by affidavit" comports with Fed. R. Civ. P. 43(a) and due process.

PARTIES TO THE PROCEEDING

Petitioner, Vista Paint Company ("Vista"), was appellant-defendant below. Respondent, the United States of America, was appellee-plaintiff below.

Pursuant to this Court's Rule 29.6, petitioner notes that Vista is not the parent or subsidiary of any other corporation. Vista has not issued any shares to the public.

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The ultimate purpose of the separation of powers, this Court has often stated, is "to protect the liberty and security of the governed." *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). This case presents the question whether this statement is true as a practical matter or simply rhetoric. The Legislative, Executive, and Judicial Branches of the Federal Government have come together in this case to impose a penalty of more than a *million* dollars on the owner of a small, family-run business. Congress enacted a statute, the Clean Air Act, that authorizes such crushing penalties and limits citizens' ability to contest them in judicial proceedings. The Environmental Protection Agency ("EPA") deployed the full brunt of its enforcement powers against petitioner. And, most disturbing of all, the lower courts gave petitioner the back of the hand, limiting its ability to contest the penalty by denying

traditional and fundamental procedural protections. The lower courts in this case essentially abdicated their role as guardians of liberty, and instead operated as a claims-processing arm of the administrative state. This Court should not allow a perceived need for administrative efficiency to override the core protections of the judicial system.

In particular, the courts below stacked the deck against petitioner in three ways. *First*, the lower courts precluded petitioner from challenging the validity of the very environmental standard being enforced, on the ground that only a *pre*-enforcement challenge could be entertained. *Second*, the lower courts refused to impose on the Government the burden of proof with respect to the appropriate penalty, and essentially required petitioner to carry the burden of proving why the maximum possible penalty should *not* be imposed. *Third*, the lower courts subjected petitioner to a "trial by affidavit," requiring petitioner to present its case in the form of written affidavits submitted simultaneously with affidavits from the Government. Each of these three rulings is incorrect and unfair, and each conflicts with rulings from other federal courts. For these reasons, and to underscore that the federal courts are more than rubber-stamps for administrative enforcement decisions, this Court's review is warranted.

OPINIONS BELOW

The Ninth Circuit's decision below can be found at 129 F.3d 129 (1997) (Table), 1997 WL 697295, and is reprinted in the Appendix ("App.") at 1a-2a. The order denying a petition for rehearing and suggestion for rehearing *en banc* is reprinted at App. 3a. The District Court's unreported opinion below can be found at 1996 WL 477053, and is reprinted at App. 4a-33a.

The Ninth Circuit's decision in the first round of this litigation can be found at 976 F.2d 739 (1992) (Table), 1992 WL 236898, and is reprinted at App. 34a-45a. This Court denied a petition for writ of *certiorari* from that decision on October 4, 1993. *See* 510 U.S. 826 (1993).

JURISDICTION

The Ninth Circuit entered the judgment below on November 4, 1997, *see* App. 1a, and denied petitioner's timely petition for rehearing and suggestion for rehearing *en banc* on January 23, 1998, *see id.* at 3a. Justice O'Connor granted an extension of time for filing this petition to and including May 23, 1998. Because that day is a Saturday, and May 25, 1998, is a federal holiday, this petition is timely filed on May 26, 1998. *See* S. Ct. Rule 30.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Section 113(e)(1) of the Clean Air Act, 42 U.S.C. § 7413(e), provides, in relevant part, as follows:

> In determining the amount of any penalty to be assessed under this section . . . the court . . . shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of non-compliance, and the seriousness of the violation . . . .

Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), provides, in relevant part, as follows:

> (1) A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit . . . . Any petition for review under this subsection shall be filed within sixty days from the date notice of such

> promulgation, approval or action appears in the Federal Register . . . .
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement . . . .

The version of Fed. R. Civ. P. 43(a) applicable to the trial below provides as follows:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

STATEMENT OF THE CASE

A. Background of the Alleged Violations

Vista is a small, family-run paint business founded in 1957 by its owner and president, Eddie Fischer. *See* App. 46a. At the time of trial, Fischer operated a single factory in Fullerton, California, maintained 28 retail stores in Southern California, and manufactured and sold about 300,000 gallons of paint each year. *See id.* at 17a-18a. Prior to this case, Vista had a perfect record of compliance with all applicable laws. *See id.* at 16a, 40a.

The Clean Air Act, 42 U.S.C. § 7401 *et seq.*, gives the States primary responsibility for regulating air pollution. A State must develop a State Implementation Plan ("SIP") for enforcing the Act within its borders, and then submit that SIP to the EPA for approval. *See* 42 U.S.C. § 7410. Once the SIP is approved by the EPA, it becomes federal law. *See* 42 U.S.C. § 7413. A State can modify a federally approved SIP by submitting a revision, which the EPA can either deny, conditionally approve, or fully approve. *See* 42 U.S.C. § 7410(k)-(l).

The State of California, in turn, has delegated primary responsibility for enforcing the Clean Air Act to local "air quality districts," which have the authority under state law to promulgate their own rules. *See* Cal. Health & Safety Code § 40000 *et seq.* In 1984, two local air quality districts in which Vista sells paint adopted rules mandating a drastic reduction in the volatile organic compound ("VOC") content of certain paints. *See* App. at 5a, 71a. In practical effect, these new standards required Vista and other manufacturers to reduce the amount of thinners and solvents in their paint. *See id.* at 48a-49a. These standards were approved by the EPA as part of the California SIP in early 1985. *See* 50 Fed. Reg. 3338 (Jan. 24, 1985).

The State of California, however, postponed the effective dates of the stringent VOC standards, and twice petitioned the EPA to revise the federally approved SIP to postpone their effective dates as a matter of federal law as well. *See id.* at 20a. The EPA never acted on one petition, and ultimately denied the other some *four years* later, in early 1989, shortly before the requested postponement would have expired in any event. *See id.*; *see also* 54 Fed. Reg. 5236 (Feb. 2, 1989).

Meanwhile, in May 1987, the EPA sent information requests under the Clean Air Act to Vista and many other manufacturers. *See* App. at 7a-8a, 50a-51a. The EPA thereafter issued Vista notices of violation with regard to the VOC standards, including standards that had never been implemented under California law. *See id.* at 8a, 20a-21a, 52a, 57a.

B. The First Trial and Appeal

In December 1990, the EPA filed this civil penalty action against Vista. *See id.* at 73-79a. In particular, the agency contended that the company had violated the Clean Air Act by (1) selling paint that did not meet the stringent VOC standards incorporated in the California SIP, *see* 42 U.S.C. § 7410, and

(2) failing to comply with the statutory reporting provisions, *see* 42 U.S.C. § 7414. *See also* App. at 76a-77a.

Vista sought to defend itself on the ground, among others, that the VOC standards contained in the federally approved SIP were invalid because they had been promulgated in violation of California law. This argument was based on a number of irregularities, including the fact that the VOC standards were technologically and economically infeasible, at least as applied to a small business like Vista.

The District Court (Real, J.) rejected this defense, holding that a federally approved SIP could not be challenged in an enforcement proceeding, but only in a *pre*-enforcement challenge to the adoption of the SIP. *See* App. 91a-92a. Without changing a word in the EPA's proposed findings of fact and conclusions of law, Judge Real entered summary judgment against Vista, ordering the company to pay over *$3 million* in penalties. *See* App. 69a-72a. The Judge provided no analysis of conflicting evidence relating to the mandatory penalty factors set forth in the Clean Air Act. *See* 42 U.S.C. 7413(e).

Vista appealed to the Ninth Circuit, claiming, *inter alia*, that the District Court had erred by (1) precluding the company from challenging the validity of the very standards being enforced, and (2) summarily awarding a penalty without consideration of the statutory penalty factors. The Court of Appeals affirmed the District Court's refusal to entertain a challenge to the validity of the VOC standards, *see id.* at 36a, but reversed the summary penalty and remanded for a new trial on the appropriate penalty (if any), *see id.* at 45a. Vista then filed an unsuccessful interlocutory petition for *certiorari* on the first issue. *See* 510 U.S. 826.

C. The Second Trial and Appeal

The case on remand was assigned first to Judge Tashima, and then (after Judge Tashima's elevation to the Ninth Circuit) to Judge Timlin. Two pretrial rulings are critical here. *First*,

the District Court rejected Vista's argument that the Government bore the burden of proof with respect to any facts underlying the application of the statutory penalty factors. *See* App. at 86a-88a. Ruling from the bench, Judge Timlin asserted that "there's no burden of proof in this particular trial," *id.* at 87a, and later amplified on this ruling by holding that "[t]his Court will first determine the maximum penalty allowable and then consider any mitigating circumstances," *id.* at 22a.

Second, the District Court ordered the trial to be structured in a most unorthodox manner. The court required both parties to present their case-in-chief *solely* through written affidavits submitted simultaneously, and precluded either party from relying on live testimony as part of its case-in-chief. *See id.* at 66a, 80a-84a. Judge Timlin acknowledged the novelty of these procedures (which originally had been ordered by Judge Tashima), but refused to revisit the prior procedural rulings. "[T]his is my first experience with evidence on declarations simultaneously filed. This is a classic pilot program for reconsideration of allowing testimony by declarations. But that's the way it is." *Id.* at 83a.

Pursuant to these procedures, Vista and the EPA presented their cases-in-chief by exchanging written affidavits in May 1994. *See id.* at 81a. A year later, in May 1995, Judge Timlin held a "trial" to allow limited cross-examination by both sides. *See id.* at 82a, 85a. Almost another year later, in April 1996, the Court issued an order imposing a penalty of $1,111,250. *See id.* at 33a.

Vista appealed to the Ninth Circuit for a second time, challenging (1) the District Court's failure to impose the burden of proof on the Government, and (2) the District Court's novel procedures. The Ninth Circuit, however, affirmed in a one sentence order. *See id.* at 1a-2a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Courts Below Erred in Precluding Vista From Challenging the Validity of a Regulation in a Proceeding to Enforce that Regulation.

Prior to this Court's decision in *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), it was settled that a regulated party generally could not challenge a regulation *prior* to enforcement, on the ground that such a challenge was not yet "ripe." *See, e.g., FPC v. Metropolitan Edison Co.*, 304 U.S. 375, 383-85 (1938). *Abbott Labs* lifted that absolute barrier, holding that pre-enforcement review may be appropriate where the issues are sufficiently concrete for judicial resolution and the challenged regulation would have a direct and immediate pre-enforcement effect on the regulated party. *See* 387 U.S. at 148-56. Over the ensuing decade, Congress moved swiftly to transform this limited exception into the rule. Important new statutes *required* regulated parties to challenge a regulation prior to its enforcement, and *precluded* them from raising such a challenge when the regulation was actually enforced against them.

The Clean Air Act is one such statute. Section 307(b)(1) of the Act authorizes regulated parties to challenge the EPA's adoption of a SIP within 60 days after the appearance of notice in the Federal Register. *See* 42 U.S.C. § 7607(b)(1). Section 307(b)(2), in turn, provides that "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. § 7607(b)(2).

This case presents the questions (1) whether these provisions preclude a challenge to a federally approved SIP based on economic or technological infeasibility, and, if so, (2) whether these provisions are constitutional. Both these questions have vexed and divided courts and commentators. The first question was expressly noted, but left unresolved, by this Court in

Union Elec. Co. v. EPA, 427 U.S. 246, 268 n.18 (1976). The second question was raised, but left unresolved, in concurrences by Justice Powell in *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 594-95 (1980), and *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289-91 (1978), and has been the subject of great interest among the lower courts and commentators. This Court should grant review here to resolve these important and unsettled issues of federal law.[1]

A. Section 307(b)(2) Does Not Preclude Vista's Challenge to the California SIP.

Vista argued below that the VOC standards included in the California SIP — the very standards on which the EPA bases this enforcement action — are invalid on several grounds under California law. Among these grounds are claims relating to economic and/or technological infeasibility, which are factors that local air quality districts in California must consider under state law when promulgating standards. Thus, for example, the "control measures" imposed by a local air quality district must be "efficient and cost-effective." Cal. Health & Safety Code § 40440. In addition, a local air quality district must assess and duly consider the economic impact of its standards. *See Western Oil & Gas Ass'n v. Air Resources Bd.*, 691 P.2d 606, 608 (Cal. 1984). Vista was precluded from raising either of these two challenges to the VOC standards below, even though it could not have raised such challenges involving economic and/or technological feasibility in a direct challenge to the EPA's adoption of the California SIP. *See Union Elec. Co.*, 427 U.S. at 256 ("[C]laims of economic and technological

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[1] No significance can be attached to the fact that Vista's interlocutory petition for *certiorari* raising these issues was denied in 1993. This Court "generally await[s] final judgment in the lower courts before exercising [its] *certiorari* jurisdiction." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (statement of Scalia, J., respecting denial of *certiorari*) (collecting cases); *see generally* R. Stern *et al.*, *Supreme Court Practice* § 4.18 at pp. 195-98 (7th ed. 1993).

infeasibility [are] wholly foreign to the Administrator's consideration of a state implementation plan.").

Both the District Court and the Ninth Circuit, however, held that Vista was precluded from challenging the validity of the VOC standards in this enforcement proceeding on the ground that it had not mounted a pre-enforcement challenge to those standards. *See* App. at 36a. Vista had "ample opportunity," the Ninth Circuit asserted (without citation), to challenge those standards when the EPA adopted the California SIP. *Id.* The Ninth Circuit thus joined the Third Circuit in broadly construing § 307(b)(2) of the Clean Air Act to preclude all challenges to the validity of a SIP, even where (as here) those challenges involve economic and/or technological infeasibility. *See Getty E. Oil Co. v. Ruckelshaus*, 467 F.2d 349, 355-56 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *see also United States v. Ethyl Corp.*, 761 F.2d 1153, 1155-58 (5th Cir. 1985) (broadly holding that § 307(b)(2) precludes all enforcement challenges to a federally approved SIP), *cert. denied*, 474 U.S. 1070 (1986); *Lubrizol Corp. v. EPA*, 562 F.2d 807, 813-15 (D.C. Cir. 1977) (same); *Friends of the Earth v. Carey*, 552 F.2d 25, 34-35 (2d Cir. 1977) (same).[2]

Three other circuits, in contrast, have recognized that challenges based on economic and/or technological infeasibility cannot be raised in a petition for direct review, and hence may properly be raised as a defense to an enforcement proceeding. *See Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885, 891 (8th Cir. 1977); *Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839, 845 (7th Cir. 1975); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 172-73 (6th Cir. 1973); *cf. Union Elec. Co. v. EPA*, 593 F.2d 299, 304 (8th Cir. 1979) ("[A] company seeking to have these issues reviewed . . . could present its

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[2] Some of these cases refer to the previous codification of § 307(b)(2) in 42 U.S.C. § 1857h-5(b)(2). Although the time period for filing petitions for review under this provision has increased, the substance of the provision has otherwise remained unchanged.

cause as a defense to any enforcement proceedings initiated by the EPA in federal district court."), *cert. denied*, 444 U.S. 839 (1979). These courts recognize that claims of economic and technological infeasibility are beyond the EPA's authority to consider in the SIP approval process, and thus are outside of the preclusive scope of § 307(b)(2) by that provision's very terms.

To determine whether a SIP was technologically and/or economically feasible, the Sixth Circuit explained, would require a hearing "on the record" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 553(c), whereas the SIP review process is not a formal, "on the record" rulemaking. *Buckeye Power*, 481 F.2d at 172-73. In addition, the Sixth Circuit noted, the judicial review provisions of the Administrative Procedure Act expressly authorize judicial review of agency action "in civil or criminal proceedings for enforcement" except "to the extent that prior, *adequate*, and exclusive opportunity for judicial review is provided by law." 5 U.S.C. § 703 (emphasis added). "Since we have determined that there could not have been an adequate hearing on individual claims such as those presented by petitioners herein prior to approval of the state plans, the claims can be asserted as a defense in either federal or state enforcement proceedings." *Buckeye Power*, 481 F.2d at 173.

The interpretation of § 307(b)(2) advanced by the Sixth, Seventh, and Eighth Circuits comports with traditional principles of statutory construction. Because judicial review is vital to the legitimacy of administrative action, this Court traditionally has given a very narrow reading to provisions limiting such review. *See, e.g., McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991). Indeed, in *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), this Court went out of its way to avoid construing § 307(b)(2) to preclude a challenge to an EPA-approved emission standard in an enforcement proceeding. Invoking the rule of lenity, the Court concluded that the standard at issue was not, in fact, an

"emission standard" within the meaning of the Clean Air Act and thus was outside the scope of § 307(b)(2). *Id.* at 278-89.

The Court should now resolve this division in the lower courts and clarify the circumstances, if any, under which § 307(b)(2) of the Clean Air Act allows regulated parties to challenge the validity of an EPA-approved SIP in an enforcement proceeding.

B. If Construed to Preclude Vista's Challenge to the California SIP, Section 307(b)(2) is Unconstitutional.

A cardinal reason to construe § 307(b)(2) to authorize Vista's challenge to the validity of the VOC standards in this enforcement proceeding is that a contrary construction of that provision would be unconstitutional — or, at the very least, raise very serious constitutional doubts. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575 (1988); *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *see also Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

The constitutional issue presented by § 307(b)(2) is stark: can a defendant in a regulatory enforcement proceeding be denied the opportunity to present a defense? The "fundamental requirement of due process is the opportunity to heard . . . in a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). For a defendant in a civil (or criminal) enforcement proceeding, the most meaningful time to be heard is obviously during the course of such a proceeding, not at the earlier time when the regulation is first included in a SIP, when the precise interests of all who might be affected are hypothetical and unfocused. Absent extraordinary circumstances, to preclude a defendant in an enforcement proceeding from challenging the validity of the very regulation being enforced is to deny due process. *Cf. General Motors Corp. v. Ruckelshaus*, 724 F.2d 979, 984 n.30 (D.C. Cir. 1983) (Section 307(b)(2) presents constitutional

problems that have not yet been resolved), *vacated on other grounds*, 742 F.2d 1561 (D.C. Cir. 1984) (*en banc*), *cert. denied*, 471 U.S. 1074 (1985); *Chrysler Corp. v. EPA*, 600 F.2d 904, 912 (D.C. Cir. 1979) (noting "[t]he nagging presence of a substantial due process question" presented by § 307(b)(2)).

It is no answer to say that the regulated party could have mounted a *pre*-enforcement challenge. Pre-enforcement challenges, as noted above, have always been the exception, rather than the rule, in our legal system. *See, e.g., New England Tel. & Tel. Co. v. Public Util. Comm'n of Me.*, 742 F.2d 1, 7 (1st Cir. 1984) (Breyer, J.), *cert. denied*, 476 U.S. 1174 (1986). The opportunity to challenge a regulation at the time the EPA adopts a SIP is no opportunity at all, as most potential targets of that regulation are unaware that it may eventually be enforced against them. Vista, for one, does not (and cannot afford to) pay a staff of lawyers to comb through the Federal Register every day to see if any of its interests might be affected by revisions to a SIP. As Justice Powell has explained, it "is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation — especially small contractors scattered across the country — would have knowledge of [a regulation's] promulgation, or familiarity with or access to the Federal Register." *Adamo Wrecking*, 434 U.S. at 289-91 (concurring opinion); *see also Holmes Limestone Co. v. Andrus*, 655 F.2d 732, 740-41 (6th Cir. 1981) (Merritt, J., concurring) (echoing Justice Powell's notice concerns), *cert. denied,* 456 U.S. 995 (1982). Vista, like any other regulated party, should be allowed to defend itself when its interests in the validity of a regulation become concrete: *when the regulation is enforced against it.*

Only once has this Court upheld a limitation on the right to present an effective defense as substantial as the limitation set forth in § 307(b)(2) of the Clean Air Act. In *Yakus v. United States*, 321 U.S. 414 (1944), this Court upheld the validity of the Emergency Price Control Act enacted during the Second World War, which limited judicial review of price controls to

pre-enforcement challenges, and precluded any challenge to the validity of a price control during an enforcement proceeding.

It remains an open question, however, whether *Yakus* applies outside the unique factual context of wartime price controls. *See Adamo Wrecking*, 434 U.S. at 289-90 (Powell, J., concurring); *United States v. Saade*, 652 F.2d 1126, 1133 n.9 (1st Cir. 1981); Note, *Increased Judicial Scrutiny of Administrative Crime*, 77 Cornell L. Rev. 612, 633 (1992) (characterizing *Adamo Wrecking* as an example of judicial "sleight of hand" to avoid addressing *Yakus*' continuing validity or scope). There is simply no basis for extending the extraordinary wartime holding in *Yakus* to uphold the validity of a provision like § 307(b)(2) precluding enforcement challenges of peacetime environmental regulation. *See, e.g., United States v. Sagner*, 71 F. Supp. 52, 53 (D. Or. 1947) (predicting that "solid part of the bar" will eventually request reconsideration of *Yakus*), *rev'd on other grounds*, 331 U.S. 791 (1947); Recommendation of the Administrative Conference, 41 Fed. Reg. 56768 (1976) ("The express preclusion of review at the enforcement stage creates a highly unusual and unnecessarily harsh restriction on the right to challenge the validity of a regulation to which one is subject."); D. Currie, *Judicial Review Under Federal Pollution Laws*, 62 Iowa L. Rev. 1221, 1258-60 (1977) (criticizing constitutionality and policy basis of § 307(b)(2)).

By transforming the narrow *Yakus* exception of limited judicial review of enforcement proceedings into the rule, Congress has unconstitutionally stacked the deck against regulated parties like Vista. It is high time for this Court to underscore the limited scope of *Yakus*, or overrule that decision altogether. As Professor Verkuil has noted, failure to resolve definitively the constitutional vitality and scope of *Yakus* merely "causes an unnecessary loss of time and a waste of decision resources for all three branches of government." P. Verkuil, *Congressional Limitations of Judicial Review of Rules*, 57 Tulane L. Rev. 733, 772 (1982-83).

II. The Courts Below Erred in Holding that the Government Does Not Bear the Burden of Proof with Regard to Penalty Factors Under the Clean Air Act.

On remand from the Ninth Circuit to reconsider the appropriate penalty (if any) to be assessed against Vista, the District Court refused to place on the Government the burden of proving the facts underlying the various statutory penalty factors. According to the District Court, "there's *no burden of proof* in this particular trial." App. 87a (emphasis added). The Court then proceeded, if anything, to put the burden on *Vista* to prove that any penalty less than the maximum was warranted. "This Court will first determine the maximum penalty allowable and then consider any mitigating circumstances." App. 22a. These holdings are plainly erroneous: there *is* a burden of proof with regard to proof of penalty factors in Clean Air Act enforcement actions, and that burden rests squarely on the Government. The District Court's improper allocation of the burden of proof infected the entire proceeding.

Section 113(e)(1) of the Act, 42 U.S.C. § 7413(e)(1), requires a court assessing the amount of a statutory penalty to consider various factors, including the size of the defendant's business, the economic impact of the penalty on that business, and the defendant's compliance history. In order to assess these factors, of course, the court first must find the underlying facts. *See Atlantic States Legal Found. v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990) (district court must "clearly indicat[e] the weight it gives to each of the factors in the statute and the factual findings that support its conclusions"); *see also Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 573 (5th Cir.), *cert. denied*, 117 S. Ct. 57 (1996); *Public Interest Research Group v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 79 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991). And, to find facts, the district court must allocate a burden of proof. *See, e.g., Engle v. Isaac*, 456 U.S. 107, 118 (1982). There is no

basis in law or logic for the District Court's conclusion that "there's no burden of proof" in a proceeding to determine the appropriate penalty (if any) for a violation of the Clean Air Act.

Where, as here, the Government seeks to exact a penalty, it must carry the burden of proving that the penalty is justified. Our legal system rests on a "presumption in favor of freedom." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 320 (1993) (Stevens, J., concurring in judgment). Absent explicit statutory command (and there is none in the Clean Air Act), the *Government* should bear the burden of proving facts to justify the appropriate penalty (if any); the *defendant* should not be saddled with the burden of proving facts to *rebut* the maximum penalty requested by the Government. *See, e.g., United States v. Midwest Suspension and Brake*, 824 F. Supp. 713, 735 n. 30 (E.D. Mich. 1993), *aff'd*, 49 F.3d 1197 (6th Cir. 1995); *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338 (E.D. Va. 1997); *Student Public Interest Research Group v. Monsanto Co.*, 18 Envtl. L. Rep. 20,999, 1988 WL 156691 (D.N.J. 1988). As the *Monsanto* court explained:

> I expressly reject [the Government's] argument that, in setting a penalty, the court should place the burden on the on the defendant to establish facts that justify some amount less than the maximum allowed by law. That would, in my view, be a novel and wholly untenable principle to apply to any civil penalty statute.

Monsanto, 18 Envtl. L. Rep. 20,999, 1988 WL 156691, at *16.

Other courts, however, agree with the lower courts in this case that a district court should presumptively apply the maximum penalty and require a defendant to prove facts in mitigation. *See, e.g., United States v. Marine Shale Processors*, 81 F.3d 1329, 1337 (5th Cir. 1996); *Leslie Salt Co. v. U.S.*, 55 F.3d 1388 (9th Cir.), *cert. denied*, 516 U.S. 955 (1995); *United States v. B&W Inv. Props.*, 38 F.3d 362, 368

(7th Cir. 1994), *cert. denied*, 514 U.S. 1126 (1995); *Atlantic States Legal Found.*, 897 F.2d at 1142 (same).

The Court should resolve this conflict of authority on such an important issue of federal law. By refusing to place squarely on the Government the burden of proving the facts underlying the penalty factors, and by requiring the defendant to prove facts in mitigation of the maximum penalty, the District Court improperly stacked the deck against Vista. The allocation of the burden of proof is no technicality; it influences the entire fact-finding process. "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *see also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) ("burden of proof is dispositive" when fact-finder cannot otherwise resolve an issue conclusively). Indeed, as this Court has explained, a misallocation of the burden of proof can "vitiat[e]" all factual findings. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

III. The Abbreviated Penalty Trial Afforded to Petitioner Did Not Comport with the Federal Rules of Civil Procedure or the Constitution.

The "trial" held on remand below was nothing of the sort. Rather than (1) requiring the EPA to put on its case first, present its witnesses, and subject those witnesses to cross-examination, and then (2) allowing Vista to put on its own case, the District Court ruled both the Government and Vista should simultaneously submit their cases-in-chief in the form of written affidavits. The Court then gave a nod toward traditional practice by allowing the parties to cross-examine adverse witnesses in open court. This peculiar procedure, which even the District Court characterized as novel, App. at 83a, bears no resemblance to the procedure required by the Federal Rules of Civil Procedure or the Constitution. Although district courts surely enjoy a measure of discretion in structuring their proceedings, they do not have discretion to dispense with bedrock procedural rules. The District Court

here raised concerns of administrative efficiency above concerns for fundamental fairness. This Court should not tolerate this assembly-line approach to justice.

In particular, the District Court's novel procedure violated Rule 43(a) of the Federal Rules of Civil Procedure, which, at the time of trial, provided that "[i]n *all* trials the *testimony of witnesses* shall be taken orally in *open court*, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court." Fed. R. Civ. P. 43(a) (emphasis added).[3] The text of the Rule could not be clearer. The "testimony of witnesses" must be delivered "in open court." Trials by affidavit are not permissible.

Indeed, previous attempts to dispense with the testimony by witnesses in open court have been rebuffed by courts sensitive to the command of Rule 43(a) and the Constitution. "It is not within the province of the court to resolve issues of disputed fact in a trial by affidavit." *Ross v. Franzen*, 777 F.2d 1216, 1220 (7th Cir. 1985); *see also Dolence v. Flynn*, 628 F.2d 1280, 1281 (10th Cir. 1980) (*per curiam*); *United States v. J.B. Williams Co.*, 498 F.2d 414, 430 n.19 (2d Cir. 1974). Judicial convenience cannot justify a contrary result. Thus, in *United States v. AT&T*, 83 F.R.D. 323, 339 & n.46 (D.D.C. 1979) — surely a complicated case if ever there was one — Judge Greene rejected a proposal to proceed by affidavits rather than live testimony. As the Judge explained, Rule 43(a) authorized no such departure from "the historic practice of courts of this

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[3] The word "orally" was deleted as part of a series of technical amendments effective April 23, 1996, but those amendments were not intended to have any substantive effect. As explained by the Advisory Committee notes accompanying the amended Rule, the word "orally" was deleted to accommodate witnesses who are "not able to communicate orally," and therefore need to communicate through other means, such as "writing or sign language." The amendment in no way purported to dispense with the requirement to present the "the testimony of witnesses . . . in open court" or otherwise authorize trials by affidavit.

nation" absent an unequivocal command. *Id.* at 339. Neither the statute at issue there, nor the Clean Air Act at issue here, provides any such command.

In light of the plain text of Rule 43(a), it goes without saying that courts have no "inherent power" to dispense with the "testimony of witnesses" presented "in open court" in favor of trial by affidavit. Whatever the scope of such power, it plainly cannot trump the clear limitation established by the Rule. *See, e.g., Carlisle v. United States*, 517 U.S. 416, 426 (1996). "[F]ederal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-255 (1988).

Despite the clarity of Rule 43(a), many courts (like the courts below) have held that it is permissible to receive evidence in written form as long as it is later subject to cross-examination. *See, e.g., Bellaire Gen. Hosp. v. Blue Cross Blue Shield*, 97 F.3d 822, 826-28 (5th Cir. 1996); *Ball v. Interoceanica Corp.*, 71 F.3d 73, 77 (2d Cir. 1995), *cert. denied*, 117 S. Ct. 169 (1996); *In re Adair*, 965 F.2d 777, 779-80 (9th Cir. 1992) (*per curiam*); *Phonetele, Inc. v. AT&T*, 889 F.2d 224, 232 (9th Cir. 1989), *cert. denied*, 503 U.S. 914 (1992); *In re Stevinson*, 194 B.R. 509, 511-12 (D. Colo. 1996); *see also* Hon. Charles Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to Be Submitted in Written Form Prior to Trial*, 72 Geo. L.J. 73 (1983). The Ninth Circuit has succinctly summarized the reasoning of these courts in authorizing departures from traditional procedures: "The use of written testimony is an accepted and encouraged technique for shortening bench trials." *Phonetele*, 889 F.2d at 232.

Other courts, however, have neither "accepted" nor "encouraged" this aberrant approach. *See Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 313 (7th Cir. 1986) (Easterbrook, J.); *Lebeck v. William A. Jarvis, Inc.*, 250 F.2d 285, 294-95 (3d Cir. 1957); *AT&T*, 83 F.R.D. at 339 & n.46

("The Court has found no provision in the Rules to contradict the express mandate of Rule 43(a)."); *see also Eccles v. People's Bank of Lakewood Village*, 333 U.S. 426, 434 (1948) (Frankfurter, J.) ("Modern equity practice has tended away from a procedure based on affidavits and interrogatories, because of its proven insufficiencies.").

This Court should grant review here to resolve this split of authority and to reaffirm the traditional right, codified in Rule 43(a), to have factual disputes tried on the basis of "the testimony of witnesses . . . in open court."

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-counter-defendant-Appellee,

v.

VISTA PAINT CORPORATION,

Defendant-counter-claimant-Appellant.

No. 96-55670.
D.C. No. CV-94-00127-RT

ORDER*

Appeal from the United States District Court
for the Central District of California
Robert J. Timlin, District Judge, Presiding

Submitted Oct. 6, 1997**
Pasadena, California

Decided Nov. 4, 1997.

Before PREGERSON, D.W. NELSON, and HAWKINS,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Circuit Judges.

We affirm for the reasons stated in the district court's Findings of Fact and Conclusions of Law entered April 16, 1996.

All motions pending before this Court are denied as moot.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-counter-defendant-Appellee,

v.

VISTA PAINT CORPORATION,

Defendant-counter-claimant-Appellant.

No. 96-55670
D.C. NO. CV-94-00127-RT

Filed January 23, 1998

ORDER

BEFORE: PREGERSON, D.W. NELSON, and HAWKINS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has called for a vote to rehear this matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISTA PAINT CORPORATION,

Defendant.

CASE NO. EDCV 94-0127 RT.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

United States District Court, C.D. California.

Filed April 16, 1996.

The matter came on regularly for trial, United States District Judge Robert J. Timlin presiding. After having heard the arguments of counsel and examined the evidence presented, the Court makes the following findings of fact and conclusions of law:

I.

FINDINGS OF FACT

A. Amended Findings of Uncontroverted Facts and Conclusions of Law.

The following Findings of Fact are conclusively established by the Amended Findings of Uncontroverted Facts and Conclusions of Law, filed February 11, 1992 ("Amended Findings"), and the Amended Pretrial Order, filed January 3, 1993 ("1/3/94 Court Order"):

1. In 1984, as part of the State Implementation Plan ("SIP") for California to limit the VOC content of paint, the South Coast Air Quality Management District ("SCAQMD") and the San Diego County Air Pollution Control District ("SDCAPCD") adopted SIP Rules 113[*] and 67.0. These rules regulate non-flat architectural coatings, otherwise known as gloss or semi-gloss paints, which are commonly used to paint structures, mobile homes or pavement. In order to control air pollution from the manufacture and application of these coatings, the rules limit their VOC content to no more than 250 grams of VOC per liter of coating ("250 g/l VOC"), and forbid the sale, offer for sale, or application of any such paint exceeding these VOC limitations ("non-compliant coatings").

2. As background, local and regional government authorities under California law have primary responsibility for control of air pollution. Cal. Health & Safety Code § 40000 et seq. Two of these local authorities are the SCAQMD, which includes Los Angeles and Orange Counties, and the SDCAPCD, which includes San Diego County. These districts are empowered to adopt rules governing air pollution and to independently enforce them as state law. Id. at § 40001. As for the federal government, the Clean Air Act ("CAA") provides the EPA with independent authority to enforce federally approved air pollution control laws. Section 110 of the Act, 42 U.S.C. § 7410 (Section 7410), requires among other things that each state submit rules for emission limitations to be

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[*] [So in original and throughout remainder of opinion. The actual number of the rule is 1113.]

incorporated into the SIP, and enforced as federal law by the EPA. See 42 U.S.C. § 7413.

3. In 1985, the U.S. Environmental Protection Agency ("EPA"), pursuant to the CAA, approved SCAQMD Rule 113 and SDCAPCD Rule 67.0 as part of the SIP for California, to be enforced as federal law. 50 Fed. Reg. 3338 (January 24, 1985).

4. Vista's president was aware of these rules and their purpose in the time period between 1985 to 1987, to control VOC emissions. Vista was both a long-time manufacturer and seller of non-compliant coatings, having produced its "Trim-Kote" and "Proformer" brands with VOC's in excess of 250 g/l for over ten years. Vista offered these non-compliant coatings for sale for the five-year period preceding February 1987.

5. EPA met with industry trade associations in 1987, including the National Paint & Coatings Association and the Southern California Paint & Coatings Association, regarding its strategy for taking enforcement action against companies violating the 1985 VOC limitations set by law. EPA informed the industry that it would, as a matter of enforcement discretion, prioritize enforcement against those companies that did not cease the manufacture of non-compliant coatings by July 1, 1987, and who did not cease their sale of non- compliant coatings by September 1, 1987. Thus, while EPA retained the discretion to prosecute any company that violated the VOC limitation after January 24, 1985, EPA announced that those companies that persisted longest in their continuing violations of the Clean Air Act would be the first to be prosecuted.

6. On March 19, 1987, in order to determine the compliance status of the paint industry with the VOC limitations of federal law, EPA issued a request for information to a number of paint manufacturers, including Vista, pursuant to Section 114 of the CAA, 42 U.S.C. § 7414 ("Section 114

Request"). EPA required that each company report the volume of each non-architectural coating that it manufactured from February to May 1987, and the VOC content of each coating. Each company was given until April 7, 1987, to submit their first reports, and warned that non-compliance would subject them to civil penalties.

7. Vista did not respond to EPA's March 19, 1987 request. Vista's president cannot recall why Vista did not respond. Faced with Vista's recalcitrance, EPA subsequently issued an Administrative Order against Vista pursuant to Section 113(a)(3) of the CAA, finding that Vista had violated Section 114 of the CAA in failing to provide the requested information to EPA. 42 U.S.C. §§ 7413(A)(3)[*], 7414. Per its Order, EPA directed Vista to disclose by no later than April 16, 1987, the VOC content of the architectural coatings that it manufactured or distributed from February through May 1987.

8. Vista only partially complied with EPA's Administrative Order, responding in a letter postmarked April 20, 1987, by disclosing the VOC content of the architectural coatings it manufactured in February and March 1987 only. Vista's letter disclosed that its monthly paint production was approximately 25,000 gallons of coatings, with 55 percent by volume of the identified coatings exceeding the 250 g/l VOC limitation of federal law. Vista did not respond to EPA's Order regarding its coatings manufactured in April and May 1987, and did not provide the requested information.

9. EPA subsequently sought more specific information from the paint manufacturers regarding the trade name, volume and VOC content of each non-compliant coating sold in each California air quality district in March, April and May 1987. On May 15, 1987, EPA sent Vista a modified request for more

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* [So in original.]

specific information to supplant its initial request for information. Alternatively, EPA specified that the paint manufacturer could stipulate that it sold and/or offered for sale coatings in violation of the 250 g/l VOC limitation, and the month and location where the non-compliant paint was sold. Vista was advised that a failure to provide the requested information would subject Vista to an enforcement action for civil penalties of $25,000 per day of violation.

10. Vista responded by a letter dated June 12, 1987. Without disclosing the months in which it sold non-compliant coatings, Vista admitted to selling non-compliant coatings in the SCAQMD and the SDCAPCD. Vista's president also confirmed Vista's prior admissions in his sworn deposition testimony. Yet the information regarding the volume of each such non-compliant Vista coating sold and the location of their sale was available to Vista in March, April and May of 1987.

11. Based upon Vista's admission, EPA issued a Notice of Violation to Vista on June 19, 1987, pursuant to Section 113(a)(1) of the CAA.

12. EPA, in its continuing effort to compel Vista to comply with the law, sent Vista a second Section 114 request on June 19, 1987, requesting documentation of any quantities of Vista non-compliant coatings manufactured and sold in the subsequent July-October 1987 period. This request required Vista to (1) establish and maintain records regarding their non-compliant coatings; (2) report the volume of non-compliant coatings sold in August through October 1987 and their location of sale; (3) report the name and VOC content of the coatings sold; and (4) report the identity of coatings manufactured by Vista from July through October 1987.

13. The information requested by EPA's June 19, 1987, Section 114 request was available to Vista at the time of EPA's

request. EPA again warned Vista at that time of the $25,000 per day penalty if the requested information was not received.

14. In an effort to further accommodate the paint industry and Vista, EPA by its letter dated July 22, 1987, modified its second Section 114 request with a strictly tailored condition. In this letter, EPA stipulated that if Vista would commit to (1) the cessation of the manufacture of non-compliant coatings by July 1, 1987, (2) the cessation of all sales of non-compliant coatings by September 1, 1987 (a condition never fulfilled by Vista, see below), and (3) disclose the time and location of sales of non-compliant paint in August 1987 (another condition never fulfilled by Vista), that Vista would be relieved of its obligation to provide the other information requested by EPA in its prior June 1987 letter. Vista was still required to maintain all relevant records of its manufacture and sale of non-compliant coatings. EPA was explicit, however, that all conditions must be strictly complied with if Vista was to be relieved of any of its reporting obligations.

15. Vista continued to manufacture, sell and offer for sale its non-compliant coatings throughout April to October 1987, but did not provide any reports to EPA. Vista continued to manufacture non-compliant coatings in April, May and June of 1987, and continued to sell and offer for sale its non-compliant coatings in the Los Angeles and San Diego areas throughout June, July, August and September 1987. Although Vista continued to sell non-compliant coatings, Vista submitted no report of its August sales as requested in EPA's July 22, 1987, letter and no report as required by EPA's June 19, 1987, letter. EPA, per the CAA Section 113, 42 U.S.C. § 7413, gave notice to the appropriate state air pollution control agency of this enforcement action.

16. On August 19, 1987, Vista's president, Eddie R. Fischer, telephoned William Wruble of EPA Region IX to ask for more time to sell his non-compliant coatings. After

discussing Vista's situation, Mr. Fischer stated that "he had no choice but to sell the [non-compliant] paint past September 1, and was planning to do so." Mr. Fischer then stated that "he would (could) litigate if he had to, since the option was to go out of business."

17. Mr. Wruble denied Vista's request for additional time to sell its non-compliant coatings, and explained that Vista's failure to take EPA's enforcement authority seriously was not a reason to grant it additional time to sell non-compliant coatings. Mr. Fischer then said that he "didn't think it was our [EPA's] intention to put him in jail, although he'd be willing to pay a 'reasonable' fine to be able to continue to sell his violating coatings."

18. Vista was also warned by the local SDCAPCD to cease its sale of non-compliant coatings by September 1, 1987, a warning Vista received at least by July 28, 1987. Vista, however, continued to sell non-compliant coatings throughout September 1987. Vista admits that such non-compliant coatings remained offered for sale throughout Vista's San Diego stores in September 1987. Vista also continued its refusal to respond to EPA's request for information.

19. Further evidence that Vista sold non-compliant coatings after September 1, 1987, is provided where inspectors from the SDCAPCD purchased the Vista-brand "Trim-Kote" coating, a non-compliant coating, from Vista's retail outlet on Kearney Villa Road in San Diego, California, on September 2, 1987. The SDCAPCD's laboratory analysis revealed that the purchased paint had a VOC concentration of 387 g/l, well above the permissible 250 g/l permitted by SDCAPCD Rule 67.

20. The SDCAPCD inspectors purchased a second gallon of non-compliant coating, a Vista paint under the brand name "Proformer," from the same Vista San Diego store on

September 22, 1987. The SDCAPCD laboratory analysis revealed that the purchased paint had a VOC concentration of 381 g/l, well above the permissible 250 g/l permitted by SDCAPCD Rule 67.

21. Both Vista's records and its president corroborate these violations. Vista's April 16, 1987, report to EPA identifies that its "Trim-Kote" and "Proformer" paints as non-compliant coatings, have a VOC concentration of 340 and 380 g/l, respectively. Vista's president confirmed that Vista's "Trim-Kote" and "Proformer" paints purchased by the SDCAPCD inspectors would be expected to have VOC concentrations in excess of 250 g/l. Mr. Fischer further admits that non-compliant coatings were sold in San Diego on September 2, 1987. Based upon these illegal sales, the SDCAPCD cited Vista with two misdemeanor Notices of Violation for its violations of SDCAPCD Rule 67. Cal. Health & Safety Code § 42400.

22. Faced in September 1987 with enforcement action from the SDCAPCD (EPA had not yet taken its enforcement action against Vista), Vista sought a variance from the SDCAPCD Hearing Board.

23. As background, the variance procedure is a creation of the California Health & Safety Code §§ 42350 et seq., and provides the applicant with a procedure to obtain relief from a local rule (not a federal rule) under certain strictly limited conditions. Cal. Health & Safety Code § 42350. In part, an applicant cannot obtain a variance unless the applicant attests that it "is, or will be, in violation of Section 41701 or of any rule, regulation, or order of the district." Cal. Health & Safety Code § 42352(a). Thus, by applying for a variance, Vista further admitted that it was in violation of SDCAPCD Rule 67 and/or its intent to violate that rule for the express purpose of selling the remainder of Vista's non-compliant paints within the next 90 days.

24. Vista was subsequently unable to persuade a majority of the SDCAPCD Hearing Board at its September 24, 1987, hearing that a variance was warranted, and Vista obtained no variance relief at any time from the SDCAPCD. Vista applied to the SDCAPCD Hearing Board for reconsideration, then dropped its request. Vista represented instead that it had removed its non-compliant paint from its San Diego stores as of October 12, 1987, but after the September 24, 1987, variance hearing. Vista's president explains that he removed the non-compliant coating from his San Diego stores because those coatings were not selling well. Vista subsequently paid a fine to the SDCAPCD for its violations of their local rules.

25. The VOC's emitted by Vista's paint are a primary precursor of ozone, or smog, which the EPA has designated as a major air pollutant. 42 U.S.C. §§ 7408, 7450, 7451; 40 C.F.R. ¶¶[*] 50.1, 50.9. The 13,000 gallons of coating offered for sale in September 1987 in San Diego by Vista would release approximately eight tons of VOC hydrocarbons.

26. Ozone pollution causes serious adverse health effects, including coughing, reduced lung capacity, respiratory infection and possible permanent lung damage. There is also evidence that the young, the elderly, and those persons with respiratory ailments (such as asthmatics) are among those who are particularly susceptible to the adverse effects of ozone. At certain concentration levels, ozone irritates the respiratory system and causes coughing, wheezing, chest tightness and headaches. Due to its irritation nature, ozone can aggravate asthma, bronchitis and emphysema. Some studies indicate that chronic exposure to fairly low levels of ozone may reduce resistance to infection and alter blood chemistry or chromosome structure. At higher concentrations [of ozone], hospitalization becomes a possibility.

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[*] [So in original.]

27. Ozone also causes significant damage to the environment, where ozone can destroy vegetation, reduce crop yield, and damage exposed materials by causing cracking, fading and weathering. Moreover, clear evidence shows that ozone damages economically, ecologically and aesthetically important plants. When exposed to ozone, major annual crops produce reduced yields. Some tree species suffer injury to needles or leaves, lowered productivity and, in severe cases, individual trees can die.

28. EPA has through the federal Clean Air Act attempted to control and regulate VOC emissions from a variety of sources, including paint manufacturers. In 1987, EPA found that 40 paint companies, including Vista, were in violation of the federal CAA's limitation on VOC concentrations in their coatings. All 40 paint companies received a Notice of Violation, and 38 announced their intent to cease non-compliant paint sales. Only one company announced its intent to continue to violate the VOC restrictions, to intentionally violate the law despite repeated warnings from the regulatory agencies, and to disregard the effects of its violations on human health and the environment: that company was Vista.

29. After EPA referred this matter to the U.S. Justice Department for enforcement action, Vista for the first time produced a letter it purportedly prepared on or about August 4, 1987, and sent to EPA, that represented that Vista had ceased its manufacture of non-compliant coatings on June 30, 1987, and "will not offer for sale any non-compliant coatings after September 1, 1987."

30. This representation has in fact proven to be false. Vista's president admits that sales of such coatings continued well after September 1, 1987. In addition, there is no copy of the letter in EPA's files or any other indication that it was received by EPA prior to the date it was produced to the U.S. Department of Justice in 1989. Vista's president testified that

he cannot recall ever seeing the purported Vista August 4, 1987, letter before 1989, when it was first produced to the U.S. Department of Justice.

31. Vista appears to have had no intention of ceasing its sale of non-compliant coatings in August 1987, where Vista's president announced to EPA at precisely the same time that Vista would continue its sales of non-compliant paint after September 1, 1987, and Vista in fact did so. Vista's president said that Vista would go bankrupt if it could not sell its non-compliant paint, a statement that again cannot be reconciled with Vista's purported August 1987 letter.

32. The United States propounded interrogatories and requests for production of documents on May 1, 1991, seeking this identical information requested by EPA in 1987. Vista responded with groundless objections with no legal basis, and flatly refused to provide the information or produce the relevant documents. The United States then brought a motion to compel Vista to comply with its discovery requests. As a result, this Court ordered that Vista (1) specifically identify by September 27, 1991, the quantity of its non-compliant coatings manufactured and sold in 1987, and (2) produce the requested documents at the U.S. Attorney's Office by no later than October 25, 1991, again mirroring the information requested by EPA in 1987.

33. Vista did not identify its non-compliant coatings with a verified response per this Court's Order, and as required by Section 114 of the CAA, but instead directed the United States to look through unidentified documents at its warehouse. Moreover, Vista has refused to make those documents available for inspection until October 25, 1991.

34. Vista has already provided its sworn response stating unequivocally that no documents exist regarding its sale or offer for sale of non-compliant coatings prior to August 30,

1987. See Vista's "Supplemental" Responses No. 2 and 3. This unexplained disappearance of Vista's documents is directly contrary to EPA's Section 114 requirement that Vista retain those documents.

35. Vista's sworn responses to the United States' Requests for Admission ("RFA") cannot be reconciled with the deposition testimony of Vista's president, where he admits precisely the same facts that Vista denies in its RFA responses. For example, Vista's president admits that he knew that Vista was selling non-compliant coatings in September 1987. Fischer Depo. p. 188. But see Vista RFA No. 27. There are numerous other examples. See Vista RFA Nos. 1, 2, 3, 5, 6 and 7. See especially Vista's evasive response to RFA No. 13 and 14.

B. Memorandum of the Ninth Circuit Court of Appeals (Court of Appeals).

The following Findings of Fact are conclusively established by the Memorandum in United States v. Vista Paint Corp., No. 92-55160 (9th Cir., Sept. 24, 1992) ("Memorandum"), and the "1/3/94 Court Order."

1. Vista had ample opportunity to submit comments on the inclusion of the local rules in the California State Implementation Plan ("SIP") pursuant to Section 307(d) of the CAA, and to challenge EPA's approval of the inclusion of those rules in the SIP pursuant to Section 307(b)(1) of the CAA.

2. Vista admits that it did not halt the sale of non-complying paint by September 1, 1987.

3. Vista was manufacturing, selling and offering for sale non-complying coatings in 1985, when the volatile organic compounds ("VOC") limit became effective.

4. In June 1987, Vista told EPA that it was selling non-complying paint in the SCAQMD and the SDCAPCD.

5. Vista's president, Eddie Fischer, admitted that Vista had been violating the rules since 1985 and was doing so before and after September 1, 1987.

6. Vista also admitted that these violations in the SDCAPCD continued until October 12, 1987.

7. Fischer expressly testified in his deposition that non-complying paint was offered for sale after September 1, 1987, in San Diego.

8. EPA's second information request required Vista to establish and maintain certain records and to submit certain reports. Vista's president admitted that the kind of information EPA sought was available when EPA requested it.

9. If Vista had stopped offering for sale and selling non-complying paint by September 1, 1987, it would have been relieved of some of the requirements in this request. However, Vista continued to sell such paint after September 1, 1987. Vista's president understood that the requirements of the second request were waived only if Vista stopped selling non-complying paint by September 1, 1987. Although Vista admittedly continued to sell non-complying paint after September 1, 1987, it never provided the information requested by EPA.

10. Vista [has a] history of full compliance.

11. The duration of violation [is settled].

12. SDCAPCD previously assessed a $500 penalty.

13. The $500 Vista paid to the SDCAPCD [was] on a fine originally set at $2,000.

14. Vista obtained a "significant economic benefit" that supported a "substantial penalty."

15. Vista has improperly failed to disclose information which it has or had in its exclusive possession to assess the precise economic benefit to it due to its illegal offer for sale and sale of non-compliant coatings.

16. Vista failed to submit admissible evidence to controvert the U.S.A.'s showing of Vista's significant economic benefit.

17. EPA's ability to gather information on potential violations is vital to enforcement of the CAA. It is irrelevant that no ozone was formed from Vista's failure to supply the information.

18. Vista's president was told by EPA and the San Diego District that, if it did not stop selling non-complying paint by September 1, 1987, enforcement would follow. There was nothing unusual or perplexing in these instructions to Vista.

C. Findings of Fact After Trial.

The following Findings of Fact are established by the evidence at the trial on certain remanded civil penalty issues.

1. Vista is a company whose primary operation consists of manufacturing and selling at retail paint and paint products. It is the largest manufacturer, distributor and retail seller of paint in Orange County, California. Vista manufactures approximately 25,000 gallons of paint each month for sale at its stores in California. It has 28 retail locations in Southern California, including San Diego County. Its total sales in 1990, 1991 and 1992 exceeded $44,000,000 in each year, and its total

sales in 1993 approximated $47,000,000. Its general office and sole paint manufacturing plant are located in Fullerton, California. It has 400 employees.

2. In 1994, Vista's net worth was approximately $12,000,000 and its net current assets were approximately $8,553,000.

3. Eddie Fischer is the sole owner and president of Vista. Mr. Fischer has ultimate control of all operational, financial and managerial decisions of Vista. Vista is a Subchapter S corporation for federal tax purposes, which causes all taxable income of Vista to be allocated to Mr. Fischer and is taxed at the appropriate individual tax rates.

4. For the years following the filing of this lawsuit for which Vista has filed income tax returns, Vista's gross profits have remained relatively steady: $20,063,000 for 1990; $19,543,000 for 1991; and $19,596,000 for 1992. Because of certain transactions between Vista and Mr. Eddie Fischer, its sole equity owner, Vista's reportable net income since this lawsuit was filed has been drastically reduced: $2,241,000 in 1990; $582,000 in 1991; and a net loss of $464,000 in 1992.

5. By reason of certain transactions between Vista and Mr. Eddie Fischer, the total shareholder equity in Vista is $2.9 million.

6. However, Vista's purported financial condition of only $2.9 million in stockholder equity has not precluded Vista's ability to obtain a $3 million dollar letter of credit from Bank of America posted with the District Court. See Vista's motion for release of Rule 62(d) security, filed on March 2, 1993. In its financial analysis of Vista, exhibit 107, Bank of America partly concludes at page 2 that Vista lowered its retained equity because of the instant action:

"In June 1991, Mr. Fischer was advised that it would be advantageous for him to withdraw $7,950M in retained earnings from Vista. This represented the Sub chapter S earnings upon which he has paid income taxes, since Vista became a Sub S corp. in 1986. This amount was lent to the company and subordinated to the Bank. This accounting action was also taken to lower the retained earnings because of the EPA suit." (Emphasis added).

7. On March 10, 1992, Vista posted with this Court a Standby Letter of Credit from Bank of America in the amount of $3,176,723 to secure the summary judgment in the amount of $3,020,000 entered against Vista by Judge Real.

8. Bank of America concluded that Vista is easily capable of financing a $3.02 million dollar judgment against it:

"Judge Manuel Real of the US District Court imposed a $3MM fine . . . even if the total fine would be levied Vista Paint could put together the financing to repay the fine over a relatively short period of time."

9. The Court of Appeals on page 10 of its Memorandum discussed the seriousness of the violation factor as one of the seven criteria provided in 42 U.S.C. 7413(e) for consideration by the Court in determining the amount of penalty to be assessed. It stated that as to the application of that factor to the Section 110 violation (selling or offering for sale in violation of SIP) there was a triable issue of material fact regarding how many gallons of non-compliant coatings Vista was offering for sale during September 1987 in San Diego County. The Court finds that Vista offered for sale at least 13,000 gallons of non-compliant coatings in San Diego in September 1987. It also finds that Vista sold at least 70 gallons of non-compliant coatings in San Diego during the period September 1, 1987 to October 12, 1987.

10. In August 1985, SCAQMD amended Rule 1113 to extend to 1989 California paint companies' ability to sell non-compliant paint up to 380 g/l VOC. SCAQMD's decision was known to Vista.

11. In January 1986, SDCAPCD amended its Rule 67.0 to extend to September 1, 1986, California paint companies' ability to sell non-compliant paint up to 380 g/l VOC in San Diego. SDCAPCD's decision was known to Vista.

12. Both districts subsequently submitted their new time extension revisions to EPA as revisions to the federal SIP. These proposed revisions to extend the time for compliance with their local rules which imposed a 250 g/l VOC deadline under state law, did not constitute federal law.

13. The SDCAPCD revision proposed to extend the deadline for compliance with the 250 g/l VOC limitation to September 1, 1986. The revision was submitted to the California Air Resources Board ("CARB"), then to EPA on August 12, 1986, with less than one month remaining before September 1, 1986, when the proposed local rule extension would expire by its own terms. Because of the short time remaining before it became a moot proposal, EPA did not act on SDCAPCD's proposed extension of the federal SIP as to non-compliant coatings. At all times, the federal SIP remained in effect and required compliance with the 250 g/l VOC limitation by all members of the coatings industry, including Vista.

14. The SCAQMD proposed revision to Rule 1113 was submitted to EPA and formally disapproved by EPA in 1989. See 54 Fed. Reg. 5236 (February 2, 1989).

15. Vista's violations continued in both the SCAQMD and the SDCAPCD (in violation of the SDCAPCD rule) throughout 1986 and a portion of 1987, in violation of the federal SIP.

16. The Court finds that the August 4, 1987, letter by Vista, addressed to EPA (Exhibit 13) as a response to EPA's information request of July 22, 1987 (Exhibit 12), was not sent or delivered to EPA.

To the extent that any of the foregoing Findings of Fact are deemed to be Conclusions of Law, they are incorporated into the following Conclusions of Law stated in II.B below.

II.

CONCLUSIONS OF LAW

A. The following Conclusions of Law are the law of the case by reason of the Conclusions of Law made in the Amended Findings and the 1/3/94 Court Order.

1. Vista illegally offered for sale and sold non-compliant coatings with a VOC content in excess of 250 g/l during the time period between and including December 3, 1985, through October 12, 1987, in violation of the SIP rules identified as SCAQMD Rule 1113 and SDCAPCD Rule 67, and continued to violate those rules more than 30 days after having received a Notice of Violation from EPA on June 24, 1987.

2. Vista has, therefore, violated Section 110 and 113 of the Clean Air Act, 42 U.S.C. §§ 7410, 7414, from December 3, 1985, to October 12, 1987, a total of 578 (sic) days of violations and there being no genuine issue of material fact remaining, the United States is entitled to summary judgment thereon.

3. Vista illegally and unreasonably failed to respond to EPA's June 19, 1987, request for relevant information in violation of Sections 113 and 114 of the CAA, 42 U.S.C. §§ 7413, 7414, by its failure to (a) establish and maintain records regarding their non-compliant coatings, (b) report the volume

of non-compliant coatings sold in August through October 1987 and their location of sale; (c) report the name and VOC content of the coatings sold; and (d) report the identity of coatings manufactured by Vista from July through October 1987.

4. Vista has, therefore, violated Sections 113 and 114 of the Clean Air Act from August 26, 1987, to November 18, 1991, a total of 1177 (sic) days of violations and, there being no genuine issue of material fact remaining, the United States is entitled to summary judgment thereon.

5. Section 113 of the CAA, 42 U.S.C. § 7413(b), provides for imposition of a civil penalty against Vista of not more than $25,000 per day of violation for (1) the sale or offer for sale of non-compliant VOC paint in violation of CAA Section 110, and (2) for the failure to respond to EPA's request for information in violation of CAA Section 114. 42 U.S.C. § 7413(b)(2), (4). For purposes of computing the appropriate civil penalty, the penalty period begins when the source first commits the violation and not later when the NOV is issued. This Court will first determine the maximum penalty allowable and then consider any mitigating circumstances.

6. Vista's failure to respond to EPA's request for information is equally serious. More than four years after the information was requested by EPA, then by the U.S. Department of Justice in this lawsuit, Vista has not yet responded to EPA's request that Vista specify the quantity of non-compliant paint manufactured and sold in the summer of 1987.

7. There is injury to the public when responsible parties such as Vista do not respond to official inquiries pertaining to its Clean Air Act compliance and liability. EPA must expend a significant portion of its limited monies to prosecute these actions, and the violator escapes effective regulation of its

pollution by hiding its violation and challenging EPA to find the information on its own, if it can. Where the regulatory program is designed to protect public health, as with the Clean Air Act, it is even more important to deter violators.

B. The Conclusions of Law stated in II.A above, and are applicable to all of the foregoing Findings of Facts.

1. Jurisdiction and Venue.

a. This Court has subject matter jurisdiction over this action pursuant to Section 113(b) of the CAA, 42 U.S.C. § 7413(b) and 28 U.S.C. §§ 1331, 1345 and 1355, and personal jurisdiction over the parties.

b. Venue in this district is proper pursuant 42 U.S.C. 7413 and 28 U.S.C. § 1391(c).

c. Vista is a corporation covered by the CAA, 42 U.S.C. § 7602(e).

d. EPA satisfied the requirement that notice of this action be given to the proper state air pollution control agency pursuant to the CAA, 42 U.S.C. 5.7413(b).[*]

2. Generally Applicable Law Regarding Issues Remanded For Trial.

a. The penalty criteria are set forth in CAA Section 113(e)(1), 42 U.S.C. § 7413(e)(1) (Section 7413(e)(1). In assessing civil penalties, CAA Section 113(e)(1) provides that the Court shall consider the following factors: (1) the size of the business and the economic impact of the penalty on the business; (2) the seriousness of the violation; (3) the violator's

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[*] [So in original.]

full compliance history; (4) good faith efforts to comply; (5) the duration of the violation as established by any credible evidence; (6) payment by the violator of penalties previously assessed for the same violation; (7) the economic benefit of noncompliance, and such other factors as justice may require.

b. Neither statutory nor case law (which the Court could find) dictates that the Court in weighing such factors must give more weight to any one factor than to any of the other factors.

c. Under Section 7413(e), civil penalties are awardable for violations of Sections 7410 and 7414 on days which precede the date a Notice of Violation is served by EPA on the violator. U.S. v. SCM Corp., 667 Fed. Supp. 1110, 1122-1123 (D. Md.1987).

d. The general purposes of a civil penalty are three fold: (1) retribution, (2) deterrence, and (3) restitution. Tull v. U.S., 481 U.S. 412, 422 (1987).

e. In determining the civil penalty, the Court "should give effect to the major purpose of a civil penalty: deterrence." United States v. T & S Brass and Bronze Works Inc., 681 F. Supp. 314, 322 (D.S.C. 1988), aff'd. in relevant part, 865 F.2d 1261 (4th Cir.1988), 28 ERC, 19 Envtl. L. Rep. 20, 857.

f. The Court of Appeals in its Memorandum remanded this action for trial only as to the application of certain Section 7413(e)(1) factors and then for a determination of the civil penalty under Section 7413(b).

3. Penalty Factors Remanded For Trial.

The following three statutory penalty factors were remanded for trial: (1) economic impact/size of business; (2) good-faith

efforts to comply; and (3) seriousness of violation. In addition, the interest of justice non-statutory factor of government delay remained as an unresolved issue of fact.

a. Size Of Business/Economic Impact.

Regarding the Court's consideration of the first two criteria of Section 7413(e)(1): size of the business and the economic impact of civil penalties on Vista's business (sometimes characterized collectively as the "ability to pay"), the Court, based on the facts and applicable law, considers them inextricably interrelated in their application to Vista.

Vista is an expanding business with increasing annual gross sales revenues in the range of 45 to 47 million dollars annually. It has a healthy financial structure with considerable assets and net worth, annual net income (see Findings of Fact I C 1 and 2 above). Its earning capacity and borrowing capacity are such that the total civil penalties the Court adjudicates against it in this case will not undermine its financial structure and place it in jeopardy of "going out-of-business." Vista is capable of paying the penalties which will be ordered by the Court. The Court concludes that those two factors do not support a non substantial civil penalty.[1]

b. Vista's Good Faith Efforts To Comply.

(i) Section 7410 Violations.

Although Vista had received on June 24, 1987, a Notice of Violation from EPA regarding sales of non-compliant coatings in violation of the architectural coatings rules contained in the California federally approved State Implementation Plan

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[1] This conclusion is made notwithstanding certain financial transactions since 1990 between Vista and Mr. Eddie Fischer which cause Vista to appear on financial statements to be less financially stable than it is.

("SIP") (Exhibit 10), it proceeded to sell such non-compliant coatings into November 1987. Vista's president admitted that in September 1987, it offered for sale in San Diego County 13,000 gallons of such coatings and sold 35 to 70 gallons of those coatings in that county.

Vista knowingly and intentionally violated federal law from at least December 3, 1985, to October 12, 1987, ignoring during that period repeated warnings by EPA and the June 1987 Notice of Violation. Vista made a considered decision to offer to sell and sell non-compliant coatings in violation of Section 7310 and risk penalties rather than obey the law.

During this time period, Vista knew of the federal law regulating the VOC content of its coatings and prohibiting its offering for sale and selling non-compliant coatings.

(ii) Section 7414 Violations.

Vista made no real good faith effort to comply with Section 7414 and respond to EPA's information requests. It did not respond to the March 19, 1987, request. Vista submitted incomplete responses to EPA's April 20, 1987, administrative order and transmitted inadequate responses to EPA's information requests of June 19, 1987, and July 22, 1987, in part by not providing the required reports. Vista never responded to those portions of the information requests asking for specific quantities of non-compliant paint manufactured and sold in the summer of 1987.

Vista advised the EPA that it would litigate if it had to and would continue to sell its non-compliant coatings regardless of the law, even if it had to pay a "reasonable" fine for doing so.

The Court of Appeals at page 7 of its Memorandum pointed to Mr. Fischer's statement that Vista's employees spent three days attempting to compile the information sought by EPA's

Section 114 information request and this is evidence of good faith. In fact, the documents which Vista's employees purportedly used to compile the information sought by EPA are Vista's sales receipts and such were inspected by the United States. But, these receipts were not responsive to the information requested.

Vista's corporate state of mind was to engage in a pattern of continued non-cooperation with Vista's enforcement efforts by withholding the documentation of its violations or by providing incomplete information regarding such while it continued to sell and offer to sell non-compliant coatings after the Notice of Violation. The Court concludes that such non good faith conduct supports a substantial penalty.

c. Seriousness of Vista's Violations.

(i) Section 7410 Violations.

The unlawful emissions of VOC's into the atmosphere of the SCAQMD and SDCAPCD from the application of non-compliant coatings sold by Vista between 1985 and 1987, estimated to be 13 tons per month, exacerbated the ozone problem in both districts. This calculation is based on an estimate of Vista's sale of 11,300 gallons of such coatings each month. The government was not able to ascertain the actual amount because Vista failed to comply with EPA's information requests for the actual volumes of such coatings sold or offered for sale during that period.

Findings of Facts I A 25 through 27 above describe the effects of ozone on human health and the environment. Vista's non-compliant coatings as sold and applied by its customers, contributed appreciably to the ozone content in the two districts. If Vista had complied with Section 7410, there would have been a major reduction in atmospheric pollutants in SCAQMD and SDCAPCD.

Based on the uncontradicted testimony of doctors C. Shepard Burton, Ph.d.[*], and Jack D. Hackney, M.D., the VOC emissions from the application of Vista's non-compliant coatings, however, would have no measurable negative impact on human health and the environment of the SCAQMD and SDCAPCD. Therefore, the seriousness of Vista's 7410 violations support a moderate penalty.

(ii) Section 7414 Violations.

Based on Conclusion of Law II A 7 above, and CAA's statutory scheme which makes its effectiveness depend in large part on the members of the regulated industries maintaining and keeping required records of their operations and then submitting complete, accurate and timely reports regarding such to EPA when requested, the seriousness of the 7314 violations supports a moderate to substantial penalty.

d. Government Delay As An Interest of Justice Mitigating Factor.

(i) EPA Delays In Reviewing Proposed SIP Provisions.

The period of time consumed by EPA in reviewing and making its decision on the proposed revisions by SCAQMD and SDCAPCD to extend the time to comply with SIP as to manufacturing, offering to sell and selling non-compliant coatings was not unreasonable. See General Motors Corp. v. U.S., 496 U.S. 530, 541 n. 4, 110 L. Ed.2d 480, 110 S. Ct. 2528 (1990).

As to the proposed revision to Rule 113, SCAQMD submitted it to EPA on November 12, 1985, and it was

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[*] [So in original.]

disapproved on February 2, 1989. In the period 1985 through 1989, EPA's delay in processing and acting on proposed revisions to SIP by local districts was attributable to statutory ambiguities, policy issues not resolved on a national basis, adverse court decisions affecting EPA's ability to process certain types of revisions and lack of resources. (See deposition testimony of Mr. Howekamp).

Another important factor was whether the proposed revision was controversial. The proposed revision to Rule 113 was very controversial because it provided for a four year relaxation period before it became effective. Many issues regarding this proposed revision were being discussed in the coatings industry and in the governmental agencies having regulatory authority over pollutants emitted into the atmosphere. Further, the SCAQMD had not provided enough information to support its request. Consequently, EPA had to do its own investigative work to clarify some of these issues. This slowed down the review process. (See deposition testimony of Mr. John Ungvarsky.) Additionally, as required by law, EPA submitted the proposed Rule 113 revision and its recommended disapproval to the Office of Management and Budget ("OMB") on December 12, 1986, and OMB did not report its concurrence until May 14, 1988.

Regarding SDCAPCD's proposed revision to Rule 67.0, there was no unreasonable delay by EPA in reviewing it. The revision was submitted to EPA on August 12, 1986. Because the revision became moot less than one month after it was submitted to EPA, EPA did not act on it.

In any event, even if there were unreasonable delays in acting on the proposed rule revisions, Vista was not prejudiced by them because Vista violated federal law before and after the rule revisions were submitted to EPA. Vista's violations continued in both the SCAQMD and the SDCAPCD (in violation of the SDCAPCD rule) throughout 1986 and 1987.

The effect of the local rule relaxation in the SCAQMD had no effect on Vista's violations of federal law in the SCAQMD by virtue of 42 U.S.C. § 7416, and no effect on Vista's violations of both federal and local law in the SDCAPCD.

Further, Vista was aware as early as 1985 that EPA was not inclined to allow the extensions as proposed by the districts.

Therefore, having concluded that the delays by EPA in reviewing the proposed SIP revisions were reasonable, such delays do not mitigate the amount of the civil penalties to be imposed.

(ii) EPA/Department of Justice ("DOJ") Delay In Initiating Civil Prosecutorial Action.

EPA's delay in taking enforcement action against Vista for its Sections 7410 violations during the period 1985 to October 12, 1987, was reasonable because during that period EPA was collecting and evaluating a great amount of information, including input from the coatings industry, and was engaged in lengthy discussions with the local districts regarding enforcement policy. Only in the Fall of 1987, did EPA refer the matter to the Department of Justice for prosecutorial consideration. Such delay caused no prejudice to Vista. See Conclusions in II 3 d(i) above.

As to the Section 7414 violations, the prosecutorial delay was unreasonable from June 21, 1989 through January 18, 1991. On June 21, 1989, the EPA and DOJ announced in a press release that on that date the DOJ was going to file a civil penalty enforcement action against Vista in U.S. District Court (Exhibit 638). But, DOJ did not do so until December 5, 1990.

Vista was prejudiced by such delay because from June 21, 1989 to January 18, 1991, DOJ knew that Vista was maintaining the legal position that it had complied with Section 7314 by timely and complete responses to EPA's information

requests. See the letter from Joseph J. Armao, Vista's attorney, to Gerald F. George, attorney, Enforcement Section, Department of Justice. Such delay supports a moderate reduction in the penalty for the period June 21, 1989 to January 18, 1991.

4. Penalty Factors Not Remanded For Trial.

a. Vista's Full Compliance History.

Although Vista had no history of non-compliance with the CAA before its violations of Sections 7410 and 7414, the extent and degree of such knowing and intentional violations demonstrate a history of non-full compliance. The application of this factor supports a substantial penalty.

b. Duration of Vista's Violations.

Vista's violations of Sections 7410 and/or 7414 spanned a period of almost six years. Such duration of violations supports a substantial penalty.

c. Vista's Payment of Penalties Previously Assessed For The Same Violations.

Vista was assessed by SDCAPCD $2,000.00 in penalties for two separate sales of non-compliant paints in that district after September 1, 1987, in violation of its Rule 67.0. Vista paid only $500.00 towards the fine.

The fact that Vista paid $500.00 as a penalty to SACAPCD[*] in regards to two sales, which this Court has found also constitute violations by Vista of Section 7410, is considered by this Court as a slightly mitigating factor

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[*] [So in original.]

respecting the penalty to be assessed against Vista for violation of Section 7410.

d. Economic Benefit To Vista From Non-Compliance.

Vista received significant economic benefit from its violations of Section 7410 by avoiding the cost of eliminating the sale of non-compliant coatings, including nonsalability of any inventory of non-compliant paint in stock. It also avoided the manufacturing and marketing costs of switching certain of its brands to a compliant coating status. Although many of Vista's competitors also were selling non-compliant coatings in the SCAQMD and SDCAPCD during the period December 3, 1985 to September 1, 1987, in violation of Section 7410 and, therefore, Vista had no competitive advantage over them, other coatings manufacturers and retailers were in compliance. As to the latter group, Vista derived an economic benefit from its non-compliance with Section 7410.

Further, Vista's failure to comply with Section 7414 and provide the information and records sought by EPA's information requests preclude the Court from determining the actual economic benefit to it from violating Section 7410. The Court infers from such non-disclosure that the records, which were in the exclusive possession of Vista, would confirm this Court's conclusion that Vista obtained significant economic benefit from its offering to sell and selling non-compliant paints during December 3, 1985 to October 12, 1987, in violation of Section 7410.

The application of this factor supports a substantial penalty.

5. Civil Penalty.

The Court has weighed all those factors in Section 7413(e)(1), as applied to the facts determined after trial and to

the facts previously adjudicated by Judge Real's summary judgment and affirmed by the Court of Appeals. It concludes:

a. Regarding Vista's Section 7410 violations, the Court assesses a civil penalty of $500.00 per day for each of Vista's 568 days of violations from December 3, 1985, to June 24, 1987 (the date Vista received its Notice of Violation from EPA),[2] and $2500.00 per day for each of Vista's 110 days of violation from June 24, 1987, to October 12, 1987, a total of 678 days. The total Section 7410 civil penalty is $559,000.00.

b. Regarding Vista's Section 7414 violations, the Court assesses a civil penalty of $500.00 for each of Vista's 665 days of violations from August 26, 1987, through June 21, 1989 (the date of the EPA/DOJ's press release), and $250.00 per day for each of Vista's 879 days of violation from June 21, 1989, through November 18, 1991, a total of 1544 days.[3] The total Section 7414 civil penalty is $552,250.00.

To the extent that any of the foregoing Conclusions of Law are deemed to be Findings of Fact, they are incorporated into the Findings of Fact, as stated in I. C above.

DATED: April 16, 1996

/s/ Robert J. Timlin
ROBERT J. TIMLIN
United States District Judge

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[2] Judge Real's Amended Findings calculated the days covered by such period to be 468 days.

[3] Judge Real's Amended Findings calculated the total days to be 1177 days.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISTA PAINT CORPORATION,

Defendant.

VISTA PAINT CORPORATION, Counterclaimant-Appellant,

v.

UNITED STATES OF AMERICA,

Counterdefendant-Appellee.

VISTA PAINT CORPORATION,

Third-Party Plaintiff-Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY; SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; SAN DIEGO AIR POLLUTION CONTROL DISTRICT; AIR RESOURCES BOARD; TECHNICAL REVIEW GROUP;

Third-Party Defendants-Appellees.

No. 92-55160.
D.C. No. CV-90-6449-R

MEMORANDUM*

Appeal from the United States District Court for the Central District of California, No. CV-90-6449-R; Manuel L. Real, Chief District Judge, Presiding.

Argued and Submitted August 19, 1992
Pasadena, California
Filed September 24, 1992

Before: TANG and HALL, Circuit Judges, and WALKER,** District Judge.

Vista Paint Corporation ("Vista") appeals from the district court's summary judgment in favor of the government finding Vista liable for violations of the Clean Air Act ("CAA") and awarding the United States ("USA") civil penalties and attorneys fees. Vista also appeals the dismissal of its counterclaims and third-party complaint against the Environmental Protection Agency ("EPA"), California Air Resources Board ("ARB"), South Coast Air Quality Management District ("SCAQMD"), and San Diego Air Pollution Control District ("SDAPCD").

The district court had jurisdiction over the enforcement action pursuant to 42 U.S.C. § 7413(b) and 28 U.S.C. §§ 1331, 1345, and 1355. Jurisdiction over the third-party complaint and counterclaim was disputed. We have jurisdiction over this

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Vaughn R. Walker, United States District Court Judge for the Northern District of California, sitting by designation.

timely appeal pursuant to 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand this action to the district court.

I.

Vista contends that the district court erred in granting motions striking certain of Vista's affirmative defenses and dismissing Vista's counterclaims and third-party claims for want of subject matter jurisdiction and for failure to state a claim.

A. Invalidity claims and defenses.

As Vista had ample opportunity to submit comments on the inclusion of the local rules in the California state implementation plan ("SIP") pursuant to section 307(d) of the CAA, and to challenge EPA's approval of the inclusion of those rules in the SIP pursuant to section 307(b)(1) of the CAA, the district court lacked subject matter jurisdiction over the third-party complaint, the counterclaim, and the affirmative defenses dealing with invalidity.

B. Estoppel claims and defenses.

Assuming that there was jurisdiction over the estoppel claims and defenses, the district court correctly dismissed these claims and defenses for failure to state a claim. Even if the EPA had promised not to exercise its enforcement discretion against those paint manufacturers who ceased sales of non-complying paint by September 1, 1987, and that promise was sufficient to estop EPA, Vista admits that it did not halt the sale of non-complying paint by that date. Accordingly, any "promise" would be inapplicable to Vista and it could not

prevail on its estoppel theory as a matter of law.[1] Accordingly, the district court properly dismissed the claims and defenses based on estoppel for failure to state a claim.

II.

Vista also contends that the district court erred in finding that Vista violated the CAA by selling or offering for sale non-complying paint, and by refusing to comply with EPA's information request.

A. Paint sale liability.

There was no genuine factual dispute precluding summary judgment as to Vista's liability for selling or offering for sale non-complying paint. Vista was manufacturing, selling and offering for sale non-complying coatings in 1985 when the volatile organic compounds ("VOC") limits became effective. In June 1987, Vista told EPA that it was selling non-complying paint in the SCAQMD and the SDAPCD. In his deposition, Vista's President, Eddie Fischer, admitted that Vista had been violating the rules since 1985 and was doing so before and after September 1, 1987. Vista also admitted that these violations in the SDAPCD continued until October 12, 1987.

Vista did not raise the issue that the dates of the sales were not proved for Sundays and holidays until after summary judgment had been entered. In his declaration in opposition to summary judgment, Fischer denied that Vista offered for sale thousands of gallons of non-complying paint. However, Fischer expressly testified in his deposition that non-complying paint was offered for sale after September 1, 1987, in San Diego. A party may not recant sworn testimony in order to

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[1] Vista also argues that USA is estopped due to "EPA's variance representations." However, Vista did not raise this argument until its post-judgment motion. See infra Section IV.

defeat a summary judgment motion. Juardo v. Eleven-Fifty Corp., 813 F.2d 1406, 1410 (9th Cir.1987). Accordingly, as no issue of fact or law remained, summary judgment as to liability for non-complying paint sales was proper.

B. Compliance with information request.

There was no genuine factual dispute precluding summary judgment as to Vista's liability for refusing to comply with EPA's information request. EPA's second information request required Vista to establish and maintain certain records and to submit certain reports. Vista's President admitted that the kind of information EPA sought was available when EPA requested it. If Vista had stopped offering for sale and selling non-complying paint by September 1, 1987, it would have been relieved of some of the requirements in this request. However, Vista continued to sell such paint after September 1, 1987. Vista's President understood that the requirements of the second request were waived only if Vista stopped selling non-complying paint by September 1, 1987. Although Vista admittedly continued to sell non-complying paint after September 1, 1987, it never provided the information requested by EPA. Accordingly, the court did not err in granting summary judgment as to liability for Vista's refusal to comply with EPA's information request because no issue of fact or law remained.[2]

III.

Vista also contends that the district court erred in summarily awarding civil penalties. Due to the factual nature of many of the factors the district court was required to consider in

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[2] Vista's argument that the EPA had no authority to require the sales data and that it had sufficient cause to act as it did were only raised in its post-judgment motion. See Section IV.

determining the civil penalty, summary judgment was improper.

Section 113(e)(1) of the Clean Air Act requires that:

> In determining the amount of any penalty to be assessed under this section . . . the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e)(1) (1992 Supp).[3]

A. Section 113(e)(1) factors.

1. economic impact/size of business

In opposition to summary judgment, Vista asserted that there was a genuine factual dispute as to the economic impact of the penalty on Vista's business. The court below specifically noted in its findings:

> Vista is a major manufacturer, distributor and retail seller of paint with its total sales last year exceeding 50 million dollars . . . . Imposition of the penalty assessed below would

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[3] The 1990 Amendments became effective on November 15, 1990. USA filed its complaint on December 3, 1990. Accordingly, the Amendments apply to this case.

amount to approximately six percent of Vista's sales in a single year of operation.

In his declaration, Fischer stated that Vista's overall sales for fiscal 1991 were about "$45 million and profits were approximately two million dollars. Since then, sales have been flat but profits have declined." In addition, Fischer declared that "[i]mposition of the fine sought by the government in this case, would result in the destruction of my business and the loss of 400 number of jobs [sic] in the Southern California area." USA contends that Fischer's statements did not give the court any financial information to help the court make its determination. While Vista presented no business records, tax returns, affidavits of accountants to controvert the USA claim that the imposition of the full amount of the penalty would amount to less than eleven percent of Vista's sales in one year, Fischer's declarations raise a genuine issue of material fact. Accordingly, the court erred in granting summary judgment as to this penalty factor.

2. full compliance history

The district court held that despite Vista's history of full compliance, a substantial penalty was warranted. As there was no factual dispute, summary judgment as to this factor was proper.

3. good faith efforts to comply

In opposition to summary judgment, Vista asserted that there was a genuine factual dispute as to its state of mind. A court should be wary of granting summary judgment when good faith is in question. See White v. Roper, 901 F.2d 1501, 1503-06 (9th Cir.1990); Hotel & Restaurant Employees Union v. Rollison, 615 F.2d 788, 793 (9th Cir. 1980). In his declaration, Fischer stated that Vista made every attempt to cooperate with the EPA. USA contends that there are no material facts in

dispute regarding good faith. However, the mere fact that Vista offered for sale and sold non-complying paint after September 1, 1987, does not establish that Vista acted in bad faith.[4] As there was a genuine issue of material fact, summary judgment was improper as to this factor.

In addition, the court erred in summarily finding that Vista acted in bad faith in failing to respond to the information request. In his declaration, Fischer stated that Vista attempted at all times to cooperate with the government's request. Fischer also stated that three Vista employees spent three days trying to compile the requested data. There were contested issues of material fact.[5] Vista's good faith was a question of fact that should not have been decided on summary judgment.

4. duration of violation

The district court correctly ruled that the duration of violation supported a substantial penalty. Vista's argument that any violation occurred only on the day of the deadline, but did not continue thereafter, is meritless. The CAA explicitly provides for penalties for each day that Vista fails to respond to an information request. 42 U.S.C. § 7413(b) (1992 Supp).

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[4] At summary judgment, Vista argued that the issue of state of mind was "relevant to the seriousness of any violation." As good faith is irrelevant as to the seriousness of the violations, the court correctly refused to consider good faith under that factor. Vista did not argue that its state of mind was relevant to its good faith efforts to comply. This error is likely due to the failure of USA to bring its complaint under the 1990 CAA Amendments. As good faith is a factor that the district court was required to consider, summary judgment as to this issue was not proper.

[5] Vista's contention that EPA's "promise" that any deficiencies in Vista's responses would excite "immediate" action, and its settlement letter that told Vista that EPA had "enough information to make a settlement offer," led Vista to believe that it had satisfied the information request, was not raised until the post-judgment motion.

5. payment of penalties previously assessed

SDAPCD previously assessed a $500 penalty. Vista argues that the court "appears to have given no weight to SDAPCD's evaluation of the proper penalty." This argument is meritless. The district court was not obligated to accept $500 as the proper penalty. The district court considered the $500 Vista paid to the SDAPCD on a fine originally set at $2,000.

6. economic benefit of noncompliance

The district court found that Vista obtained a "significant economic benefit" that supported a "substantial penalty." While there may have been a factual dispute as to this issue, the district court recognized that "Vista has improperly failed to disclose information which it has or had in its exclusive possession to assess the precise economic benefit to it due to its illegal offer for sale and sale of non-compliant coatings." The court also found that Vista failed to submit admissible evidence to controvert USA's showing of Vista's significant economic benefit. Therefore, summary judgment was proper as to this penalty factor.

7. seriousness of the violation

The court found that the seriousness of the violation supported a substantial penalty. In opposition to summary judgment, Vista asserted that there was a genuine factual dispute as to the effects of its emissions on human health. The only document filed by Vista in opposition to summary judgment was a declaration by Fischer. Vista offered no documentary evidence related to the quantity of paint offered for sale to controvert the government's claims as to the potential health effects of the 13,000 gallons of paint it alleged Vista had offered for sale in San Diego in September 1987. USA contends that its claim was based on Fischer's sworn

testimony before the San Diego Hearing Board that he had "13,000 gallons of paint in the San Diego district."

In its opposition, Vista represented that it had only sold 34 gallons of paint in September 1987 in the SDAPCD. But, in his supporting declaration, Fischer estimates that Vista sold at least 70 gallons. Fischer's declaration raises a genuine factual dispute as to the number of gallons offered for sale. Therefore, this element of the seriousness factor was not properly disposed of on summary judgment.

Vista also argues that any delay or lack of completeness in providing the 1987 sales data had no adverse impact on the public. This argument is meritless. EPA's ability to gather information on potential violations is vital to enforcement of the CAA. It is irrelevant that no ozone was formed from Vista's failure to supply the information. See United States v. Charles George Trucking Co., 823 F.2d 685, 689 (1st Cir. 1987) (importance of compliance with information requests).

B. Non-statutory factors.

1. governmental delay

In opposition to summary judgment, Vista asserted that there was a genuine factual dispute as to the effect of EPA's inaction on the district's proposed SIP revisions. In General Motors Corp. v. United States, 496 U.S. 530, 541 n. 4 (1990), the Supreme Court found that "the statutory remedies for EPA inaction include . . . a request pursuant to § 113(b) . . . for reduction or elimination of penalties during any period in which unreasonable agency delay results in prejudice." See also United States v. SCM Corp., 667 F. Supp. 1110, 1128 (D. Md 1987) (government delay should neither mitigate against imposition of a substantial penalty nor act to enhance the penalty amount). Vista made such a request at summary judgment.

Vista argues that EPA delayed from 1985 to 1987 in notifying the industry that it would attempt to enforce the federally approved, but locally superseded, rules. Vista also argues that the district court failed to properly consider EPA's delay in acting on the proposed SIP revisions and in bringing this action. Vista contends that had the EPA rejected the revisions earlier, it would have made none of the paint sales. The "mere failure by governmental agencies to prosecute . . . does not allow a court to reduce a penalty." Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 81 (3rd Cir. 1990). EPA is only required to act on revisions of SIPs within a reasonable time, not necessarily within four months. General Motors Corp., 496 U.S. at 536-42. USA contends that the EPA's inaction on the San Diego proposed revision was reasonable as it was submitted less than a month before September 1, 1986. Whether this and the other delays were reasonable was a question of fact that precluded summary judgment as to this factor.

2. unusual and perplexing nature of regulation

Vista did not bring up this argument until its post-judgment motion. Vista cites only United States v. Louisiana-Pacific Corp., 682 F. SUPP. 1122 (D. Colo. 1987), to support its argument that its penalty should have been reduced because of the "unusual and perplexing" nature of the regulatory scheme. Whatever the complexity of the underlying legal basis for EPA's actions, Vista's President was told by EPA and the San Diego District that, if it did not stop selling non-complying paint by September 1, enforcement would follow. There was nothing unusual or perplexing in these instructions to Vista.

3. reliance

This argument was brought forth in Vista's post-judgment motion. The district court was not bound by Louisiana-Pacific

to consider "justifiable and detrimental reliance." Accordingly, the court did not abuse its discretion in denying the post-judgment motion as to this issue.

IV.

Unfortunately, Vista intertwined the distinct issues addressed on summary judgment with those addressed only in its post-judgment motion.[6] Vista never expressly argued in its opening brief that the district court erred in denying its post-judgment motion. Even in its reply brief, Vista's arguments were, at best, unclear. Vista did not even touch on any of these arguments in its opening brief. Accordingly, we refuse to consider these arguments.

V.

We affirm the district court's decision to grant motions striking certain of Vista's affirmative defenses and dismissing Vista's counterclaims and third-party claims for want of subject matter jurisdiction and for failure to state a claim. We also affirm the district court's summary judgment as to liability, and its denial of Vista's post-judgment motion. However, we reverse the district court's summary judgment as to the civil penalty, and remand to the district court for trial on the penalty issues.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[6] After thorough review of the district court record, we conclude that the following issues were raised for the first time in Vista's post-judgment motion: Vista's liability for pre-notice of violation sales, the burden of proof regarding the dates of any sales, abuse of prosecutorial discretion, USA's failure to follow EPA's penalty policy, constitutional excessiveness, EPA's authority to require the sales data, and Vista's sufficient cause to act.

APPENDIX E

DECLARATION OF EDDIE R. FISCHER

I, EDDIE R. FISCHER, hereby declare as follows:

1. I am the President and the sole shareholder of Vista Paint Corporation ("Vista").

2. Vista began as a company in approximately 1957. However, the original name of Vista was Paint & Masonry Supply. It consisted of a small paint store located in Garden Grove, California. I originally had a partner whose name was Walt Jacobson. In about 1958, my partner and I began to manufacture paint. Our first line of paint products was called Kolor-Kote and was designed to be applied on concrete. Our original manufacturing plant was in a small garage also located in Garden Grove.

3. In approximately 1959, we moved our company to a new location in Stanton, California. This new facility was approximately 2,000 square feet in size. One half of it was devoted to a store which sold paint products and related materials. The rest of our facility was devoted to the manufacture and production of paint products. At our new location, in addition to manufacturing and selling Kolor-Kote, we developed a new line of paint called Acri-Bond. This new product line was designed for all purposes, including interior and exterior, as well as dry wall, masonry and concrete. At about that same time, we changed the name of the company to Grove Paints.

4. In approximately 1965, we relocated to a new 7,00-square foot facility also in Stanton, California. The new facility was both a manufacturing plaint, as well as a retail store outlet. During this time period, we continued to develop and

manufacture new water-base paint products, such as Dura-Glide.

5. Approximately one year later, we opened a new factory facility behind our retail store outlet in Stanton in order to develop and manufacture future product lines.

6. In or about 1969, we opened our first satellite retail outlet in Costa Mesa, California.

7. Throughout the 1970s, Vista enjoyed a moderate growth pattern and continued to open up new retail locations in Orange County.

8. In or about 1970, we changed the name of the company to Vista Paint Corporation. Vista Paint Corporation was a "C" corporation. The shareholders of the company were myself and Walt Jacobson.

9. In approximately 1975, Walt Jacobson sold his interest in Vista to me and I became the sole shareholder of Vista.

10. In the late 1970s, we began to make plans to open a new factory, warehouse, general offices, as well as a retail store outlet in Fullerton, California. This project took several years to develop. In or about 1981, we opened our new facility in Fullerton.

11. Our current operations are housed in a building of approximately 134,000 square feet in size. Vista's operations initially took up approximately 80,000 square feet of that space and currently we occupy approximately 110,00 square feet of this building.

12. Approximately 12,000 square feet of our facility is now devoted to our retail store. This store sells the Vista line of architectural coatings and related products. In addition, we sell spray equipment and related components. Also, we sell wall

coverings, mini blinds, and related items from our retail location.

13. The balance of our facility is devoted to our general offices, manufacturing and warehouse facilities. We take special pride in the nature of our equipment, quality control and environmental awareness at Vista. For example, when we first moved into our new location in 1981, we put into place state-of-the-art equipment for manufacturing and recycling. This technology includes dust-recycling and water-recycling systems. As far as I know, Vista was the first California paint corporation to be involved in 100% recycling of waste products which are generated during the manufacturing process.

14. Throughout the 1980s, Vista manufactured both water-base and oil-base paints. Approximately 80% of our production was in the water-base paint area. I believe that Vista enjoyed technological superiority over its competitors in the manufacturing of water-base paints based upon Vista's historical focus on this technology. In fact, our new plant in Fullerton was almost exclusively designed for the research, development, and manufacture of water-base architectural coatings lines. In addition, solvent-based architectural coatings are more difficult to deal with because solvent is flammable and additional safety and environmental steps need to be taken in the manufacturing process of solvent-base paints. As a result, water-base paints tend to be slightly more profitable for Vista to manufacture.

15. As a consequence, Vista had no particular incentive to emphasize its manufacturing of solvent-base architectural coatings during the 1980s. Indeed, the only reason for carrying those product lines was because the market, especially paint contractors, continued to demand solvent-based architectural coatings for a variety of applications. I believe, and I think painting contractors in Southern California concur, that there

are particular applications which can only be met by the use of properly manufactured solvent-based coatings.

16. I have a vague memory that in or about the late 1970s, the South Coast Air Quality management District ("SCAQMD") began to become involved in attempts to limit the volatile organic compounds ("VOCs") in architectural coatings. However, Vista's compliance with these rules and regulations was handled by Jerome Fischer, or Vice President of Operations, as well as by Joe Ramirez who was our Technical Director.

17. During the 1980s, Vista continued to expand into other Southern California counties, including San Diego County, Riverside County, San Bernardino, and Los Angeles County. By 1987, Vista had approximately 14 retail outlets in these various counties and $24 million in gross sales.

18. Until the early part of 1987, it was my clear understanding that Vista was required to comply with environmental guidelines which were imposed either by SCAQMD or the San Diego Air Pollution Control District ("SDAPCD"). We rarely, if ever, heard anything about requirements from the Environmental Protection Agency ("EPA") or the California Air Resources Board ("CARB").

19. In or about March 1987, I remember that I learned from either Jerome Fischer and/or Joe Ramirez that, for the first time, the EPA was demanding some manufacturing or sales information from Vista. We were quite concerned at Vista because we had historically never been required to answer to EPA in terms of providing information or adjusting our product lines to meet those requirements.

20. In addition, during the same time period, I had occasional conversations with other executives of different California paint companies, and they too expressed to me

concern and confusion about these new demands from the EPA for voluminous data from their companies as well.

21. I relied on Jerome Fischer and Joe Ramirez to gather the necessary data to comply with these EPA demands. It has always been the policy of Vista to fully and immediately comply with any information demand from any governmental agency which has jurisdiction over our company.

22. Accordingly, I was quite concerned to receive Exhibit 504 on or about April 13, 1987. This document, addressed to my attention, stated that somehow Vista was in violation for failing to comply with an information request from the EPA. I spoke with Jerome Fischer and Joe Ramirez to inquire about the status of the EPA's request. They told me that they were doing their best to pull together the voluminous materials demanded by the EPA and had hoped to receive an extension of time within which to comply. Jerome Fischer further advised me that he had attempted to reach Mr. Wruble at the EPA for such an extension and Mr. Wruble had not returned his telephone calls. I urged Jerome Fisher and Joe Ramirez to immediately comply with EPA's request. I was advised that they did so on or about April 16, 1987. Joe Ramirez and Jerome Fischer assured me that Vista would diligently comply with all requests from EPA.

23. On or about May 15, 1987, I received another information request from the EPA. This is Exhibit 507. I was very bewildered and confused by this second information request by EPA. First, the information request "withdrew" the March 19 information request we had been working hard to respond to and which, in my view, we had finally responded to completely. Second, this information request made no mention of the so-called "violation" which had been assessed against Vista for failing to comply with the March 19, 1987, request. Third, we were unclear about power and jurisdiction of the EPA in this area. We had always looked to SCAQMD and, to

a lesser extent, SDAPCD, for guidance in complying with environmental regulations. It was unclear to us, both at Vista and in my conversations with other paint company executives, what EPA was attempting to do in this area. Nevertheless, I forwarded this second information request to Jerome Fischer and Joe Ramirez and told them promptly to respond to the EPA's demands.

* * * * * [*]

24. On or about May 29, 1987, I drafted and mailed to the EPA a letter which is Exhibit 508. The purpose of this letter was to seek the assistance from the EPA which they had offered to provide in their May 15, 1987, letter. I had been trying for some time to contact Mr. William Wruble of the EPA who was listed as the point of contact at that organization. However, Mr. Wruble never returned my telephone calls. I had hoped to receive from Mr. Wruble clarification of the second and highly confusing information request from the EPA. Accordingly, my May 29, 1987, letter was an attempt to receive a return telephone call and/or assistance from the EPA. However, I never received a telephone call or return letter from Mr. Howekamp. Nor did I receive any follow-up communication from Mr. Wruble, despite my request.

25. I have reviewed Exhibit 541, the Minutes of the June 8, 1987, Architectural Coatings Task Force meeting. This refreshes my memory that in or about June 1987, we at Vista became aware from various industry sources that we could no longer manufacture non-flat, non-specialty architectural coatings with a VOC level in excess of 250 g/l. We further learned that we could no longer sell such coatings after September 1, 1987. Accordingly, we made a corporate decision at vista to discontinue those lines of non-flat, non-

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[*] [So in original.]

specialty architectural coatings which had 380 g/l VOC as of July 1, 1987.

26. In or about June 1987, we made a corporate decision to respond to the May 15, 1987, information request by stipulating as we believed we were permitted to do. I have reviewed Exhibit 509 which is a letter from Philip S. Patterson, Vista's Chief Financial Office in June 1987. This document further refreshes my memory that we determined to cease the manufacture and sale of 380 g/l non-flat, non-specialty architectural coatings as the EPA demanded we do.

27. I was very concerned and confused when, on or about June 19, 1987, I received a second notice of violation from the EPA, Exhibit 511. We were quite surprised to learn that, by stipulating to the EPA May 15, 1987, information request, we would then be found to be in violation of EPA regulations.

28. We were even more confused when we received Exhibit 512, a June 19, 1987, third information request from EPA. This third request demanded information about the manufacture and sale of our paint products for the months of August, September and October 1987. In addition, the third information request demanded manufacturing information for 380 g/l VOC coatings for the months of July though October 1987. This did not seem to pertain to Vista because we had already determined to cease the manufacture of those coatings as of July 1, 1987.

29. The third information request from EPA was modified by the EPA's fourth information request, dated July 22, 1987, Exhibit 513. This was also the first official written order from EPA to cease manufacture of 380 g/L VOC coatings by July 1, 1987, an and to cease sales of such coatings by September 1, 1987. At Vista, we decided that the stipulation proposed in this fourth information request was appropriate and we determined that, rather than complying with the confusing and conflicting

demands for information in the June and July information requests, we would stipulate as provided for on page two of Exhibit 513.

30. Accordingly, Jerome Fischer, on or about August 4, 1987, mailed to the EPA our stipulation in response to the July 22, 1987, EPA letter. We believed at the time that this stipulation answered all of EPA's concerns. We heard nothing further from EPA about the June 19 and July 22, 1987, information requests from EPA in 1987, throughout 1988 and until May 1989.

31. In or about July or August 1987, I became aware that there was a possibility that Vista could continue to sell it 380 g/l VOC coatings in San Diego County even after September 1, 1987. This was important to Vista because it has retail outlets only in SCAQMD and SDAPCD which were the only Districts of California which were prohibiting 380 g/L VOC coatings. Therefore, absent a variance, Vista would be unable to sell its inventory of 380 g/L coatings. This information came to me though conversations in the industry and perhaps through advisories which we occasionally obtained from SDAPCD. As President of Vista, I was very concerned about our excess inventory of 380 VOC paint. I was concerned for two reasons. First, the disposal of several thousand gallons of 380 VOC paint would be a waste disposal problem that we would have to deal with at Vista. Secondly, Vista had approximately $60,000 of raw materials coast invested in this 380 g/L VOC paint. I estimate that our total inventory at Vista of the 380 VOC paint was approximately 13,000 gallons at this time. Importantly, these 13,000 gallons consisted of slow-moving inventory which Vista was unlikely to sell for many months, if not longer.

32. I have reviewed Exhibit 15. This was a letter that I authored and Vista sent to its customers to described our changes in our product line in order to comply with the new EPA directives.

33. I have reviewed Exhibit 193. These are notes from a meeting conducted on August 19, 1987, and attended by Jerome Fischer, Joe Ramirez, and myself. The purpose of this meeting was to make a management decision on which of our product lines had to be pulled from the he Vista inventory by the September 1, 1987, deadline. In addition, the meting was in order to discuss new labels for our products, as well as other information to be put on the he paint containers so that our customers cold also comply with the new EPA regulations. Finally, we were reviewing certain of our product lines to determine whether we would continue to manufacture them at the lower VOC limits mandated by EPA, or whether we would discontinue those lines entirely. Ultimately, as to Vista's slow-moving product lines, a corporate decision was made to not reformulate them, but rather to discontinue the product line entirely.

34. In or about August 1987, after many additional attempts, I was finally able to talk to William Wruble of the EPA by telephone. My primary reason for attempting to contact Mr. Wruble was to try to obtain from EPA permission or a variance to sell our inventory of approximately 13,000 gallons of 380 g/L VOC paint. I was particularly concerned because the EPA had given Vista and the other paint companies only two months to dispose of substantial excess inventory. I emphasized to Mr. Wruble that we did take EPA's deadline seriously and that we had in fact ceased manufacturing of 380 VOC paint by July 1. However, a deadline of September 1, 1987, was simply too short a time period for a small paint company like Vista to be able to properly dispose of its excess inventory without suffering severe economic consequences. During the conversation, Mr. Wruble mentioned that the SDAPCD separately enforced its regulation, and that I might wish to try to obtain a variance from SDAPCD. However, he held out little hope that I would be able to obtain such a variance. I emphasized to Mr. Wruble that it was important that Vista obtain some sort of variance so that we could sell our

excess inventory of 380 g/L VOC coatings. Based upon some prior information I had received from EPA and other environmental agencies, I was aware that the EPA and other regulatory agencies would on occasion allow companies and/or industry to pay a disposal fee or other compensation for the privilege of selling out-of-date products and/or causing other emissions of pollution. I discussed this with Mr. Wruble and inquired about the possibility of Vista paying a fee or some dollar amount to dispose of our products. Mr. Wruble said that he would check with his staff and EPA attorneys, but he did not hold out much hope that such a fee or penalty could be paid. Mr. Wruble never called me back to determine what he had learned from his conversations with staff and/or EPA lawyers about this issue.

35. I have examined Exhibit 16. This is an August 24, 1987, memorandum from myself and Mr. Jerome Fischer to all Vista Personnel. These were our instructions to our personnel to advise them of our compliance with the new EPA restrictions. The memorandum was designed t prevent the sale of 380 g/L VOC coatings after September 1, 1987, and further to advise our personnel as to which coatings could continue to be sold after that date.

36. In order to attempt to obtain a variance to sell our remaining inventory in San Diego County, I contacted SDAPCD sometime in August 1987. Eventually, I believe I talked to Mr. George Seidel. Mr. Seidel advised me that we did not have to remove our "nonconforming paint" from our inventory and that, while we were applying for a variance, SDAPCD would not "shop our stores." In other words, they would just disregard that we had that paint there. Mr. Seidel, or someone else from SDAPCD, provided us with a form with which to apply for a variance to sell our 380 G/L VOC paints in SDAPCD. Exhibit 20 is a copy of that form which was filled out in our offices in Fullerton and signed by me on August 31, 1987. I believe the documents was also filed on

August 31, 1987, in San Diego. Exhibit A to the variance application is a listing of the four Vista retail paint stores in San Diego County. Exhibit A to the variance application is a listing of the four Vista retail paint stores in San Diego County. Exhibit B once again shows our certification that we had ceased the manufacture of 380 g/L VOC paint by July 1, 1987.

37. I have examined Exhibit 764 which is a copy of the notice I received from the County of San Diego scheduling Vista's variance petition hearing for September 24, 1987.

38. I have reviewed Exhibit 19, which is a September 2, 1987, receipt from Vista's San Diego retail store. It appears to reflect the purchase of a one-gallon can of Trim-Kote mahogany paint. Our Trim-Kote mahogany for sale in our San Diego outlets during that time was 380 G/L VOC. However, I had understood from George Seidel that while our variance application was pending, we would not be found to be in violation of SDAPCD Rule 67. Exhibit 19 also has a handwritten note purportedly dated 9/18/87 and signed by George Seidel which claims to reflect a conversation between myself and Mr. Seidel. I do not recall this telephone conversation. Nor do I recall specifying the number of gallons or so-called non-complaint paint as 5,200 in San Diego County after September 1987. However, this seems to be a good approximation of the number of gallons of 380 G/L VOC paint which were on our shelves in our four San Diego stores in September 1987.

39. I have examined Exhibit 191 which purports to show that Vista sold a gallon of "Proformer" paint which had in excess of 250 g/L VOCs in the Los Angeles area in September 1987. However, the Proformer quick-dry enamel which was purchased and tested was a "quick-dry enamel" which the EPA allowed to have up to 400 g/l VOC. Therefore, Vista was not in violation of Rule 1113 by the sale of this gallon of Proformer paint.

40. On September 24, 1987, I attended a hearing by the SDAPCD to consider Vista's application for a variance to sell its remaining inventory in San Diego County. The Board deadlocked one vote to one vote and no decision was taken on my application. Therefore, we made a corporate decision not to further proceed with the variance application and instead immediately to remove the remainder of our 380 g/L VOC paints from our store shelves in our four retail locations in San Diego County. That inventory was then returned to our warehouse in Fullerton, California.

41. I have examined Exhibit 42, a September 29, 1987, violation from SDAPCD. I do not recall having received this violation on or about the date it bears. I am very certain that I did not receive this notice of violation by October 12, 1987, when I sent to Mr. Edward Slater at SDAPCD Exhibit 24 certifying that Vista had removed all of the 380 g/l non-conforming VOC paint from our four San Diego stores.

42. On or about October 14, 1987, I received a notice of violation from SDAPCD. This was a result of one of our stores being shopped and one gallon of 380 g/L VOC enamel being purchased from that store. I have examined Exhibit 21, and I recall receiving only the first page of this Exhibit. I did not receive the narrative statement which comprises the last page of this exhibit.

43. I have examined Exhibit 44 which is a copy of an October 19, 1987, letter from myself to Mr. Edward Slater at the SDAPCD. This letter was sent to Mr. Slater because I had just received the October 14, 1987, notice of violation which reflected that one of our San Diego stores had been shipped in September 1987. I was concerned because it had been my understanding, as reflected in the October 19, 1987, letter, that while our variance application was pending in San Diego we would not be held to be in violation of SDAPCD Rule 67. I

heard nothing further from Mr. Slater following my correspondence of October 19, 1987.

44. The reason we did not remove our 380 g/L VOC paints from our store shelves in San Diego immediately following the SDAPCD hearing on September 24, 1987, is because that Board did not reach a decision on my variance application. I felt, therefore, that the application was still pending. In fact, a further hearing on my application was scheduled for November 5, 1987. However, on October 30, 1987, after all of the 380 g/L VOC coatings had been taken from the store shelves in San Diego, I sent a letter to Mr. F.A.M. Buck advising him that Vista did not wish to pursue the variance application further. This is Exhibit 97.

45. I have examined Exhibits 25, 773, 27 and 28. These documents reflect correspondence between myself and SDAPCD. Ultimately, my dispute with SDAPCD for having sold two gallons of 380 g/L VOC paint was resolved by Vista paying $500 in full settlement for the violation. Following my letter to SDAPCD on February 4, 1988 (Ex. 28), I heard nothing further from SDAPCD.

46. On May 11, 1989, I was very surprised to receive Exhibit 562. This letter advised me for the first time in almost two years that the EPA was concerned about our efforts to comply with its series of confusing information requests in 1987. I was advised to contact Department of Justice attorney Gerald George to give him Vista's explanation. Immediately upon my receipt of that letter, I telephoned Mr. George to discuss the matter. I wanted to know what it would take to resolve this dispute. Mr. George insisted that I "give him a number" to resolve the case. I believed I offered $500 to settle the case. Mr. George did not accept the offer, but demanded further information from Vista.

47. At about that same time, I hired the San Francisco law firm of Heller, Erhman, White & McAuliffe to assist me in this matter. My then-attorney, Joseph Armao, was able to obtain from EPA attorney Gerald George a demand of $30,000 to resolve the case. Both Mr. Armao and I felt that this amount was far too much and we countered with an offer of $5,000. I had emphasized to Mr. George that I believed my dispute with the environmental agencies had been resolved with the payment of my $500 fine to SDAPCD in early 1988.

48. In response to Mr. George's further demand for information from Vista, I sent him a letter dated June 19, 1989 (Ex. 29). In addition, I provided him with a copy of the August 4, 1987, letter which we had sent previously to EPA (Ex. 13).

49. In addition, my attorney Mr. Armao provided Exhibit 783, a June 21, 1989, letter to Gerald George with a further response to questions Mr. George had about the substance of Vista's compliance with the 1987 information request. This letter further reflects the legal advice I was being given by Mr. Armao at this time that Vista had in fact fully complied with the EPA information requests dated in March, May, June and July 1987.

* * * * * [*]

50. On or about June 23, 1989, in a further attempt to provide EPA with all of the information it was apparently seeking, Mr. Armao at my direction sent a letter, Exhibit 784, to Mr. George. This letter also included a listing of our sales from Vista store No. 9 (our largest San Diego Vista retail store) and the number of gallons and a listing of the 380 g/L VOC paint which was sold during the month of September 1987. These figures had been compiled by Vista personnel over a

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[*] [So in original.]

several day period by reviewing thousands of sales invoices and receipts. In sum, the document established that no more than 35 gallons of so-called non-compliant paint was sold by this one store during that time. By extrapolation, I estimated that Vista sold no more than 70 gallons of non-compliant paints in its four San Diego retail stores.

51. On or about June 23, 1987, I was advised by my attorney Joseph Armao that he had received a letter from Gerald George, Exhibit 522. I understood then that this letter finally showed that the EPA was satisfied with the information that they had been purportedly seeking since June 1987. However, I was very surprised to learn that the EPA's $30,000 demand had risen substantially to a new demand of $192,000. I was very confused about the alleged "economic benefit" that Vista had supposedly enjoyed from the sale of 70 gallons of so-called non-complying paint. I was further confused about EPA's application of various other penalty factors which had not been previously made known to me.

* * * * *[*]

* * * * *[*]

52. I had further discussions with Mr. Armao and he advised me that this settlement demand was exorbitant and should not be paid.

53. I did not formally reject the demand of Mr. George. I did not hear anything further from the EPA or the Department of Justice until December 1990 when Vista was served with the instant lawsuit. I was stunned to find that the EPA continued to allege that they had not received the information they had

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[*] [So in original.]

[*] [So in original.]

purportedly been seeking from Vista since June 1987. This was especially troubling to me because Mr. George had represented in June 1989 that the EPA had received all the information it had been demanding.

54. In or about January 1991, Vista retained the law firm of Donnelly, Clark, Chase & Smiland in order to represent Vista in its litigation with the EPA and the Department of Justice. During the course of the litigation over the next 11 months, I relied exclusively on this law firm to advise me how to respond to the complaint as well as to the many demands for discovery which were made by the government of Vista. During the course of the litigation in 1991, I learned from Messrs. Smiland and/or Newell of the Donnelly, Clark firm that the government was demanding access to certain Vista records. These records seemed to be the same records the government had been seeking in its June 1987 information request. Mr. Newell and/or Mr. Smiland advised me that, in their view, the government should be estopped from claiming Vista had failed to respond to the June 1987 information request. However, based upon the advice of our attorneys, Vista made a decision to give government attorneys and their staff full access to all of the business records of Vista.

55. On October 25, 1991, Assistant U.S. Attorney Peter Hsiao and Assistant U.S. Attorney Scott Park came to the Vista headquarters in Fullerton. I escorted them to Vista's document warehouse. AUSAs Hsiao and Park had full access to our document warehouse for a full day. AUSAs Hsiao and Park specified particular records that they wanted copied and we made copies for them. I assigned a Vista employee to assist AUSAs Hsiao and Park in whatever way he could for a full day.

56. During the visit to our facility by AUSAs Hsiao and Park, I had several conversations with AUSA Hsiao. During those conversation, AUSA Hsiao said that in his view the case

was worth $100,000 and he urged me to pay that amount to resolve the dispute. I replied that the case was not worth $100,000, but that $40,000 was a figure that Vista might be willing to pay. AUSA Hsiao said that he felt that might be an appropriate figure, but that other government officials would not accept less than $100,000.

57. During his visit to the Fullerton facility in October 1987, Mr. Hsiao and/or Mr. Park never advised me that there were missing documents. Never did they advise me that there were "missing" sales receipts. Indeed, none of the gentlemen representing the government who were at our facility that day ever indicated that there were any documents which they were seeking which were not made available to them. To this day, I do not believe that there are any incomplete or missing documents.

58. In or about October 1991, I traveled to San Francisco to meet with EPA attorney Letitia Moore. I believe one other individual was also present at that meeting, although I do not remember that person's name. Once again, I offered to settle this matter for $40,000, but Ms. Moore demanded a "six figure" settlement.

59. On or about October 25, 1991, I was advised by my attorneys that the government had filed a motion for summary judgment against Vista. At some point, I was advised that one of the bases for the summary judgment motion was that Vista was supposedly continuing to withhold information from the government. This was especially surprising to me because we had just provided AUSAs Hsiao and Park with full access to all Vista documents.

60. Between October 25, 1991, and November 18, 1991, I was out of the Los Angeles area for a good part of that time. However, my attorneys assured me that there were so many

substantial and triable issues of fact that it was highly unlikely that a summary judgment would be entered against Vista.

61. I was advised by telephone on or about November 18, 1991, that a $3.1 million summary judgment had been entered against Vista. I was completely stunned by that result. As a result of that judgment and the publicity which followed, morale at Vista dropped tremendously. Employees were concerned that Vista might be driven out of business and that they would lose their jobs. Customers also contacted me and other Vista employees and suggested that they could no longer do business with us because of the adverse publicity. In fact, our business was very slow in November and December 1991 and this slow period continued into the early parts of 1992. While some of that may be attributable to a seasonal drop in sales, I believe that a portion of this was also attributable to the substantial adverse publicity that Vista received. In addition, I and other Vista employees received threatening telephone calls and there was vandalism to our corporate headquarters in Fullerton.

62. At all times, it was Vista's policy to fully, completely and promptly reply to any and all government demands for information, whether from environmental agencies or from the Department of Justice.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 28 day of April 1994 at Los Angeles, California.

/s/ Eddie R. Fisher
Eddie R. Fischer

APPENDIX F

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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISTA PAINT CORPORATION,

Defendant.

No. CV 90-6449-AWT(GHKx)

~~[PROPOSED~~ AMENDED~~]~~
PRE-TRIAL CONFERENCE ORDER

Pre-Trial Conference
Date: December 20, 1993
Time: 10:00 a.m.

Pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of the Central District of California,

IT IS ORDERED:

1. The parties are plaintiff United States of America ("United States") and defendant Vista Paint Corporation ("Vista"). Vista has been served and has appeared by filing its answer in this case. The pleadings and court orders which raise the issues are:

(1) the Complaint for Injunctive Relief and Civil Penalties, filed December 3, 1990;

(2) the Answer to Complaint for Injunctive Relief and Civil Penalties and Counterclaim for Declaratory and Injunctive Relief, filed March 28, 1991;

(3) Amended Findings of Uncontroverted Facts and Conclusions of Law in Support of United States Motion for Summary Judgment, filed February 11, 1992; and

(4) the Ninth Circuit Memorandum Opinion, filed September 24, 1992.

The United States contends that the District Court's Order Dismissing Defendant's Counterclaim, Dismissing Defendant's Third Party Complaint, and Striking Certain Affirmative Defenses, filed July 23, 1991, also applies here.

2. Federal jurisdiction and venue are invoked upon the grounds:]

(1) This Court has subject matter jurisdictions over this action pursuant to Section 113(b) of the federal Clean Air Act ("CAA"), 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1331, 1345 and 1355, and personal jurisdiction over the parties herein. Vista does not contest this Court's subject matter jurisdiction.

(2) Venue in this district is proper pursuant to 42 U.S.C. § 7413 and 28 U.S.C. § 1391(c) in that Vista's principal place of business is in this district.

3. The United States estimates that the trial will require three days or less, with the use of narrative statements for direct testimony with the declarant made available for cross examination. Vista estimates that the trial will take approximately six court days.

4. The trial is to be a non-jury trial. At least one (1) week prior to the trial date, each counsel shall submit to the court and opposing counsel the findings of fact and conclusions of law which the party expects the Court to make upon proof at the time of trial as required by Local Rule 13.5.

***

DATED: JAN 03 1994, 1993[*]

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
UNITED STATES DISTRICT
JUDGE

APPROVED AS TO FORM AND CONTENT:

DATED: 12/13/93

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/s/ Peter Hsiao
PETER HSIAO
Assistant United States Attorney

LETITIA D. MOORE
U.S. Environmental Protection Agency

Attorneys for Plaintiff
UNITED STATES OF AMERICA

---

[*] [Original includes erroneous reference to 1993.]

DATED: 12/10/93

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and

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By /s/ William F. Fahey
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APPENDIX G

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISTA PAINT CORPORATION,

Defendant.

NO. CV 90-6449-R

Date: February 3, 1991
Time: 10:00 a.m.

~~[PROPOSED]~~ AMENDED FINDINGS OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT

Plaintiff United States of America's motion for summary judgment came on regularly for hearing on November 18, 1991, Chief United States District Court Judge Manuel L. Real presiding. Subsequently, defendant's Motion for Findings Of Fact and For Relief From And Amendment Of The Judgment came on regularly for hearing on February 3, 1992. After having heard the arguments of counsel and examined the pleadings, memorandum and exhibits presented by the plaintiff and defendants, the Court makes the following amended findings of fact and conclusions of law:

STATEMENT OF UNCONTROVERTED FACTS

1. Vista is a major manufacturer, distributor and retail seller of paint. It manufactures approximately 25,000 gallons of paint each month for sale at its stores in California, and its total sales last year exceeded 50 million dollars. Vista's general office and its sole paint manufacturing plant are located in Fullerton, California. Vista sells its paint at its own stores in

Stanton, Costa Mesa, La Habra, Orange, Mission Viejo, Ontario, Riverside, El Cajon, Chula Vista, Huntington Beach, and San Diego, California.

2. In 1984, as part of the State Implementation Plan ("SIP") for California to limit the VOC content of paint, the South Coast Air Quality Management District ("SCAQMD") and the San Diego County Air Pollution Control District SDCAPCD") adopted SIP Rules 1113 and 67.0. These rules regulate non-flat architectural coatings, otherwise known as gloss or semi-gloss paints, which are commonly used to paint structures, mobile home or pavement. In order to control air pollution from the manufacture and application of these coatings, the rules limit their VOC content to no more than 250 grams of VOC per liter of coating ("250 g/l VOC"), and forbid the sale, offer for sale, or application of any such paint exceeding these VOC limitations ("non-compliant coatings").

***

IT IS SO ORDERED
Dated: 2-11-92

/s/ Manuel L. Real
HON. MANUEL L. REAL
CHIEF UNITED STATES
DISTRICT JUDGE

Presented by:

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United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
SCOTT PARK

Assistant United States Attorney
/s/ Peter Hsiao
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APPENDIX H

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISTA PAINT CORPORATION,

Defendant.

NO. CV 90 6449 R

COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES

(CLEAN AIR ACT, 42 U.S.C. §§ 7401, et seq.)

Filed December 3, 1990

COMPLAINT

The United States of America ("Plaintiff"), by and through its undersigned attorneys, by the authority of the Attorney General of the United States, and at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges that:

INTRODUCTION

1. This is a civil action for injunctive relief and for civil penalties for violations by Vista Paint Corporation ("Vista"), of the Clean Air Act, 42 U.S.C. § 7401 et seq. ("the Act"), EPA regulations promulgated under the Act, and applicable portions of the federally approved California State Implementation Plan ("SIP") regulating emissions of volatile organic compounds ("VOCs").

2. Plaintiff seeks to enjoin Vista from violating the SIP at its California facilities which are located in the South Coast Air Quality Management District ("SCAQMD") and the San Diego Air Pollution Control district ("SDAPCD").

JURISDICTION AND PARTIES

3. This court has jurisdiction over this action pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b), and pursuant to 28 U.S.C. §§ 1331, 1345 and 1355.

4. Venue properly lies in this District pursuant to Section 113(b) of the Act, 42 U.S.C. 7413(b), and 28 U.S.C. § 1391(c).

5. Pursuant to Section 113(b) of the Act, 42 U.S.C. 7413(b), notice of the commencement of this action has been given to the State of California through the California Air Resources Board.

6. Vista is a corporation organized under the laws of the State of California, with its headquarters located in Fullerton, California. Vista owns and operates an architectural coatings manufacturing facility in Fullerton, California, and numerous retail sales facilities throughout the SDAPCD and SCAQMD.

7. At all times relevant hereto, Vista has sold and offered for sale within the SCAQMD and SDAPCD architectural coatings which contain volatile organic compounds ("VOCs"). VOCs are precursors to ozone, an air pollutant.

8. Vista is a "person" within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e).

STATE IMPLEMENTATION PLAN

9. Section 109 of the Act, 42 U.S.C. § 7409, requires the EPA Administrator ("Administrator") to promulgate primary and secondary ambient air quality standards for air pollutants, including ozone. On February 8, 1979, primary and secondary National Air Quality Standards ("NAAQS") for ozone were promulgated and published at 40 C.F.R. § 50.9.

10. Vista's manufacturing facility and its sales facilities for architectural coatings are located in areas in which the primary NAAQS for ozone has not been attained. 40 C.F.R. § 81.305.

11. Section 110 of the Act, 42 U.S.C. § 7410, requires the Administrator to approve any SIP for the implementation, maintenance and enforcement of such ambient air quality standards within specified time limits. Upon approval, the SIP can be enforced by the federal government under Section 113(b) of the Act, 42 U.S.C. § 7413(b).

12. On January 24, 1985, the Administrator approved SDAPCD Rule 67.0 and SCAQMD Rule 1113 as part of the SIP submitted by the State of California. 50 Fed. Reg. 3338 (January 24, 1985).

13. SDAPCD Rule 67.0 and SCAQMD Rule 1113 set limits on the VOC content of architectural coatings manufactured after September 2, 1985 that are sold and offered for sale within those districts.

FIRST CLAIM FOR RELIEF

14. Paragraphs 1-13 of this Complaint are incorporated herein by reference as if fully alleged below.

15. On or about June 19, 1987, and pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(a)(1), EPA issued to Vista a Notice of Violation ("NOV") informing Vista that it was in violation of SDAPCD Rule 67.0 and SCAQMD Rule 1113. A true and correct copy of that NOV is attached hereto as Exhibit A and incorporated herein.

16. Vista has continued to violated[*] SDAPCD Rules 67.0 and SCAQMD Rule 1113 more than thirty (30) days after issuance and receipt of the NOV.

17. Under Section 113(b) of the Act, 42 U.S.C. § 7413(b), Vista is liable for civil penalties of up to $25,000 for each day of violation of either SDAPCD Rule 67.00 or SCAQMD Rule 1113.

SECOND CLAIM FOR RELIEF

18. The allegations of Paragraphs 1-13 of this Complaint are incorporated by reference herein as if fully alleged below.

19. On or about June 19, 1987, the Administrator sent a demand for information to Vista, pursuant to Section 114 of the Act, 42 U.S.C. § 7414. On or about June 24, 1987, Vista received this information demand from the Administrator.

20. Vista has failed to supply the information specified by the Administrator in EPA's June 19, 1987 information demand to Vista.

21. Under Section 113(b) of the Act, 42 U.S.C. § 7413(b), Vista is liable for civil penalties of up to $25,000 for each day of failure to comply with the Administrator's information demand.

RELIEF REQUESTED

Wherefore, Plaintiff United States of America respectfully prays this Court to grant the following relief:

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[*] [So in original.]

A. Imposition of civil penalties of $25,000 per violation for each day Vista has violated the Clean Air Act, SDAPCD Rule 67.0 and SCAQMD Rule 1113;

B. Entry of a permanent injunction against Vista requiring it to cease violating the Clean Air Act and regulations promulgated thereunder, including SCAQMD Rule 1113 and SDAPCD Rule 67.0;

C. Award of the costs of this action against defendant and in favor of the United States of America; and

D. Such further relief as this Court may deem just and proper.

Respectfully submitted,

/s/ [illegible] for
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APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISTA PAINT CORPORATION,

Defendant.

NO. CV 90-6449 AWT

SUPPLEMENTAL SCHEDULING ORDER

This order supplements the pretrial conference order and the order re further pretrial conference, both filed January 3, 1996.

IT IS ORDERED:

1. All in limine motions shall be filed and served by March 25, and shall be noticed for hearing on April 18, 1994, at 10:00 a.m.

2. A status conference to discuss readiness for trial shall also be held on said date and time.

3. Trial is set to commence on May 23, 1994, at 1:30 p.m.

4. The direct testimony of all non-adverse witnesses shall be presented by declaration or deposition extract. The

testimony of adverse witnesses may be presented by deposition (or the witnesses called in person). All such direct testimony declarations and deposition transcript excerpts shall be filed and served not later than May 2. This requirement does not apply to rebuttal witnesses.

5. Any party desiring to cross-examine any witness whose direct testimony has been presented by declaration shall, not later than May 16, file and serve a Notice of Request To Cross-Examine Witness(es), listing the witnesses the party desires to cross-examine. All witnesses so designated in a timely Notice of Request to Cross-Examine shall be made available at trial for cross-examination. If not so made available, the direct testimony of such witness shall be stricken. Witnesses not so designated need not be produced at trial.

The designation of witnesses for cross-examination shall be made in good faith. Any designation not made in good faith or which is found to be frivolous may subject designating counsel to sanctions. E.g., 28 U.S.C. § 1927.

Dated: February 28, 1994

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ROBERT J. TIMLIN,
DISTRICT JUDGE PRESIDING

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

VISTA PAINT CORPORATION,

DEFENDANT.

CASE NO. ED CV 94-127-RT

VOLUME IV

COURT TRIAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA
FRIDAY, APRIL 28, 1995

DOROTHY BABYKIN
PRO TEM COURT REPORTER
419J - U. S. DISTRICT COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

* * *

MR. WAHL: IT SEEMS FUNDAMENTALLY UNFAIR. THEY'VE HAD A CHANCE TO REVIEW OUR DECLARATIONS AND PRESENT A WITNESS ON THE POINT, BUT WE CAN'T DO THAT.

I MEAN, I GUESS WHAT'S SUGGESTED HERE BY ANALOGY IS THAT WE CAN'T USE MR. MAHAN FOR THE VERY REASON THAT HE WAS ONE OF OUR WITNESSES FOR OUR CASE IN CHIEF. BUT IF WE HAD CALLED ANOTHER ECONOMIST, AS THEY HAVE CALLED THEIR DR. MC KEE, THE SCIENTIST, THAT THAT ECONOMIST COULD HAVE BEEN A REBUTTAL WITNESS.

SO SOMEHOW WE'VE USED MR. MAHAN IN OUR CASE IN CHIEF, BUT NOW HE'S PRECLUDED FROM BEING THE SO-CALLED REBUTTAL WITNESS. THAT DOESN'T RING FAIR, YOUR HONOR.

THE COURT: ALL I CAN SAY IS THE WAY THIS PROCESS HAS UNRAVELED IN THIS CASE, THIS IS MY FIRST EXPERIENCE WITH EVIDENCE ON DECLARATIONS SIMULTANEOUSLY FILED. THIS IS A CLASSIC PILOT PROGRAM FOR RECONSIDERATION OF ALLOWING TESTIMONY BY DECLARATIONS. BUT THAT'S THE WAY IT IS.

IT WASN'T WRITTED. HIS RULING WASN'T TAKEN UP TO THE NINTH CIRCUIT FOR REVIEW AS TO WHETHER IT WAS APPROPRIATE. BUT MAYBE YOU'LL HAVE AN OPPORTUNITY -- WHOEVER WANTS TO APPEAL WHATEVER THE RESULTS ARE BY THIS

COURT, YOU CAN RAISE THAT ON APPEAL. IT'S A CONSTITUTIONAL PROBLEM.

* * *

APPENDIX K

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ROBERT J. TIMLIN,
DISTRICT JUDGE PRESIDING

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

VISTA PAINT CORPORATION,

DEFENDANT.

CASE NO. ED CV 94-127-RT

VOLUME VII

COURT TRIAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA
THURSDAY, MAY 4, 1995

DOROTHY BABYKIN
PRO TEM COURT REPORTER
429J - U. S. DISTRICT COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012
LOS ANGELES, CALIFORNIA

THURSDAY, MAY 4, 1995; 8:40 A.M.

* * *

THE COURT: CALL THE CASE OF THE UNITED STATES OF AMERICA VERSUS VISTA PAINT CORPORATION. THE PARTIES -- ALL COUNSEL ARE PRESENT AS WELL AS MR. EDDIE FISCHER.

BEFORE WE RETURN TO RULING ON OBJECTIONS TO THE REMAINING EXHIBITS, TO WHICH OBJECTIONS ARE STILL PENDING, THE COURT'S GOING TO NOW STATE ITS RULING ON THE ISSUE WHICH WAS BRIEF BY THE PARTIES REGARDING THE QUESTION OF WHETHER THERE'S A BURDEN OF PROOF AT THE TRIAL OF PENALTIES -- PENALTY.

MS. BREMER: YOUR HONOR, IF I MAY.

THE COURT: YES.

MS. BREMER: I THINK THE QUESTION -- CERTAINLY TO THE EXTENT THAT WE UNDERSTOOD AND BRIEFED IT -- WAS THE QUESTION OF STANDARD OF PROOF.

THE COURT: THAT'S CORRECT. AND READING THE CASES, I'VE CONCLUDED THAT IF THERE IS NO BURDEN OF PROOF, THERE'S NO STANDARD.

(LAUGHTER.)

THE COURT: I'M BROADENING THE ISSUE TO GIVE YOU A BROADER RULING.

THE COURT CONCLUDES THAT THE PENALTIES PROVIDED IN THE CLEAN AIR ACT FOR VIOLATIONS OF THE CLEAN AIR ACT ARE CIVIL IN NATURE. THEY ARE NOT CRIMINAL OR QUASI CRIMINAL.

THE COURT FURTHER CONCLUDES THAT UNDER THE CLEAN AIR ACT, THERE IS NO BURDEN OF PROOF ON EITHER PARTY IN A TRIAL, WHICH IS SOLELY ON THE ISSUE OF THE AMOUNT OF CIVIL PENALTIES, IF ANY, WHICH THE COURT WILL ORDER THE DEFENDANT TO PAY.

BASED ON THE CONCLUSION THAT THERE'S NO BURDEN OF PROOF IN THIS PARTICULAR TRIAL, THE COURT DEEMS THE ISSUE OF THE STANDARD OF THE BURDEN OF PROOF TO BE MOOT.

ONCE THE LIABILITY FOR PAYMENT OF THE PENALTY IS DETERMINED BY THE COURT, AND THE COURT AT A LATER TRIAL ON THE PENALTY ISSUE RECEIVES ADMISSIBLE EVIDENCE FROM BOTH SIDES, AND THEN EXERCISES ITS DISCRETION IN DETERMINING THE AMOUNT, IF ANY, OF THE PENALTY AFTER WEIGHING AND BALANCING THE PROPER STATUTORY AND COMMON LAW FACTORS AGAINST THE FACTS WHICH IT FINDS FROM ALL THE EVIDENCE ADMITTED AT TRIAL, IS THE GOVERNING PRINCIPLE AS TO HOW THE COURT CONSIDERS THE DECISION-MAKING PROCESS AND ALSO HAS GUIDED THE COURT IN ARRIVING AT ITS CONCLUSION THAT THERE'S NO BURDEN OF PROOF IN THIS PARTICULAR TRIAL.

NOW, THAT WILL IMPACT THE ORDER OF ARGUMENT. THERE WILL BE CLOSING ARGUMENT, BUT THERE WILL BE ONLY TWO CLOSING ARGUMENTS. AND IT'S MY UNDERSTANDING THAT

THE ARRANGEMENT'S ARE THAT THE GOVERNMENT WILL MAKE THE FIRST CLOSING ARGUMENT.

* * *

APPENDIX L

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Attorneys for Third Party Defendant
Environmental Protection Agency and
Plaintiff United States of America

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISTA PAINT CORPORATION,

Defendant.

VISTA PAINT CORPORATION,

Counterclaimant,

v.

UNITED STATES OF AMERICA,

Counterdefendant.

VISTA PAINT CORPORATION,

Third Party Plaintiff,

v.

ENVIRONMENTAL PROTECTION AGENCY; CALIFORNIA AIR RESOURCES BOARD; TECHNICAL REVIEW GROUP; SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; SAN DIEGO AIR POLLUTION CONTROL DISTRICT,

Third Party Defendants.

No. CV 90-6449 (R)

~~PROPOSED~~ ORDER DISMISSING DEFENDANT'S COUNTERCLAIM, DISMISSING DEFENDANT'S THIRD PARTY COMPLAINT, AND STRIKING CERTAIN AFFIRMATIVE DEFENSES

The motion of plaintiff United States of America to dismiss defendant Vista Paint Corporation's counterclaim and to strike certain affirmative defenses in this action, and the motions of the third party defendants, Environmental Protection Agency, California Air Resources Board, Technical Review Group, South Coast Air Quality Management District and San Diego Air Pollution Control District, to dismiss defendant's third party complaint in this action, came on regularly for hearing before this Court on June 17, 1991. Appearing on behalf of plaintiff United States of America and third party defendant Environmental Protection Agency were Stephen M. Johnson and Peter Hsiao. Appearing on behalf of the third party defendant South Coast Air Quality Management District was Barbara Baird. Appearing on behalf of the third party defendant San Diego Air Pollution Control District was Miriam Milich. Appearing on behalf of the third party defendants Technical Review Group and California Air Resources Board was Norman N. Flette. Appearing on behalf of the defendant and third party plaintiff was William H. Smiland. After considering the moving and opposition papers, the arguments of counsel and all other matters presented to the Court:

IT IS HEREBY ORDERED that:

1. The motions of the third party defendants Environmental Protection Agency, South Coast Air Quality Management District, San Diego Air Pollution Control District, California Air Resources Board and Technical Review Group to dismiss defendant Vista Pain[*] Corporation's third party complaint are granted in their entirety and the third party complaint is dismissed with prejudice with respect to all third party defendants based upon the following grounds:

---

* [So in original.]

a. The Court lacks subject matter jurisdiction to review the claims raised in the third party complaint;

b. The claims asserted by the defendant in the third party complaint fail to state a claim upon which relief can be granted.

2. Plaintiff United States of America's motion to dismiss defendant's counterclaim is granted in its entirety and the counterclaim is dismissed with prejudice based upon the following grounds:

a. The Court lacks subject matter jurisdiction to review the claims raised in the counterclaim;

b. The claims asserted by the defendant in the counterclaim fail to state a claim upon which relief can be granted;

3. Defendant's First through Sixth, Eighth, Twelfth, Thirteenth, and Fifteenth through Eighteenth purported affirmative defense, inclusive, are stricken in their entirety.

DATED: This 23rd day of ~~June~~ July, 1991

/stamp/ MANUEL L. REAL
MANUEL L. REAL
Chief United States District Judge

Submitted by:

LOURDES G. BAIRD
United States Attorney
SCOTT H. PARK
Assistant United States Attorney

/s/ Peter Hsiao _____ Date 6-21-91
Assistant United States Attorney
Attorneys for Plaintiff United States of America and
Third Party Defendant Environmental Protection Agency

PETER M. GREENWALD
District Counsel

/s/ Peter Hsiao for Barbara Baird
by telephone authorization Date 6-21-91
BARBARA BAIRD
Principal Deputy District Counsel
Attorneys for Third Party Defendant South Coast Air
Quality Management District

LLOYD M. HARMON, JR.
County Counsel

/s/ Peter Hsiao for Miriam Milich
by telephone authorization Date 6-21-91
MIRIAM MILICH, Deputy
Attorneys for Third Party Defendant San Diego Air Pollution
Control District

DANIEL F. LUNGREN
Attorney General
R. H. CONNETT
Assistant Attorney General

/s/ Peter Hsiao for Norman Flette
by telephone authorization Date 6-21-91
NORMAN N. FLETTE
Deputy Attorney General
Attorneys for Third Party Defendants Technical Review Group
California Air Resources Board

* * *

(2)

Supreme Court, U.S.
FILED
AUG 10 1998
OFFICE OF THE CLERK

No. 97-1897

In the Supreme Court of the United States

OCTOBER TERM, 1997

VISTA PAINT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
PETER S. COPPELMAN
Acting Assistant Attorney General
GREER S. GOLDMAN
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Attorneys
Department of Justice
Washington, D.C. 20530-0001
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QUESTIONS PRESENTED

1. Whether a defendant in a civil enforcement action under the Clean Air Act (42 U.S.C. 7401 *et seq.*) is barred from asserting as an affirmative defense that the standards contained in a State Implementation Plan approved by the Environmental Protection Agency are technologically or economically infeasible.

2. Whether the district court acted within its discretion in declining to impose the burden of proof on either party in assessing a civil penalty against petitioner for violations of the Clean Air Act (42 U.S.C. 7401 *et seq.*).

3. Whether the district court acted within its discretion by ordering the parties to submit their trial witnesses' direct testimony by affidavit and to make the witnesses available for cross-examination.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1897

VISTA PAINT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) affirming the judgment of the district court is unpublished, but the decision is noted at 129 F.3d 129 (1997) (Table). The district court's opinion (Pet. App. 4a-33a) setting civil penalties is unreported. An earlier opinion of the court of appeals (Pet. App. 34a-45a) concerning, *inter alia*, the district court's dismissal of petitioner's affirmative defenses is unpublished, but the decision is noted at 976 F.2d 739 (Table). The district court's order (Pet. App. 89a-92a) concerning petitioner's affirmative defenses is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1997. A petition for rehearing was

denied on January 23, 1998. Pet. App. 3a. Justice O'Connor granted petitioner an extension of time to and including May 23, 1998, to file its petition for a writ of certiorari. The petition was filed on May 26, 1998 (a Tuesday after a federal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States brought this action under the Clean Air Act, 42 U.S.C. 7401 *et seq.*, to enforce provisions of California's State Implementation Plan (SIP) limiting the levels of volatile organic compounds (VOCs) in certain paints. VOCs are a principal source of ozone in the atmosphere. The VOC limits were approved by the federal Environmental Protection Agency (EPA) in 1985 as part of the California SIP. Petitioner Vista Paint Corporation, a paint manufacturer and retailer, was still violating the VOC limits in 1987. This civil enforcement action seeks the imposition of monetary penalties for petitioner's continued violation of the VOC limits and for petitioner's related non-compliance with an EPA information request.

1. The Clean Air Act, as amended, requires the EPA to promulgate National Ambient Air Quality Standards (NAAQS) for various air pollutants. 42 U.S.C. 7409. It also requires each State to submit to the EPA a plan to implement, maintain, and enforce those standards. 42 U.S.C. 7410(a)(1). The EPA is required to approve any such SIP that comports with the Clean Air Act. 42 U.S.C. 7410(k)(3). Once the EPA approves a SIP or SIP revision, the EPA may enforce its provisions as federal law. 42 U.S.C. 7413(a)(1). See *Train* v. *Natural Resources Defense*

Council, 421 U.S. 60, 63-67 (1975); *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 265-266 (1976).[1]

Section 307(b)(1) of the Clean Air Act provides for judicial review of certain actions by the EPA, including its promulgation of any NAAQS and its approval of any SIP or SIP revision. 42 U.S.C. 7607(b)(1). The petition for review must be filed in the court of appeals within 60 days after the date on which notice of the EPA's action appeared in the Federal Register. *Ibid.* The Act further provides that any "[a]ction of the [EPA] Administrator with respect to which review could have been obtained under [Section 307(b)(1)] shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. 7607(b)(2).

The EPA has the authority to require any person subject to the Clean Air Act to establish and maintain records and to provide such information as the EPA may reasonably require to determine whether a violation of the Act has occurred. 42 U.S.C. 7414(a)(1)(A), (B) and (G).

A person who violates a SIP or refuses to comply with an information request is liable for a civil penalty of up to $25,000 for each day of violation. 42 U.S.C. 7413(b).

2. The State of California delegates primary responsibility for air pollution control to local and regional authorities. In 1984, two such authorities, the South Coast Air Quality Management District

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[1] Under the Clean Air Act, the States retain the authority to adopt their own air pollution control standards and limitations, as long as those standards and limitations are no less stringent than those imposed by federal law. 42 U.S.C. 7416; see *Union Elec.*, 427 U.S. at 265.

and the San Diego County Air Pollution Control District, adopted rules governing the VOC content of non-flat architectural coatings, which are more commonly known as gloss and semi-gloss paint. The rules specify that each liter of such paint may contain no more than 250 grams of VOC. The EPA approved those rules as part of the California SIP on January 24, 1985. 50 Fed. Reg. 3338 (1995).[2]

3. On June 12, 1987, petitioner admitted to the EPA that it was still selling paint that violated the VOC limits in the California SIP. The EPA, pursuant to Section 113(a)(1) of the Clean Air Act, 42 U.S.C. 7413(a)(1), issued a Notice of Violation to petitioner. The EPA also sent information requests to petitioner, pursuant to Section 114 of the Clean Air Act, 42 U.S.C. 7414, seeking documentation of the quantity, sales volume, and VOC content of all non-compliant paint that petitioner manufactured and sold from July to October 1987. The EPA warned petitioner of the $25,000 per day penalty for not providing the information in a timely manner. Pet. App. 8a-9a.

Petitioner continued to manufacture non-compliant paints until June 1987 and continued to sell non-compliant paints until October 1987. But petitioner did not file the reports required by the EPA that would have reflected those sales. Pet. App. 9a, 15a-16a.

---

[2] Both districts later adopted more lenient versions of those rules and submitted them to the EPA for approval. But the EPA did not approve them. The revised rules therefore have no effect on the enforceability of the VOC limits approved by the EPA in 1985 as part of the California SIP. 42 U.S.C. 7416; *General Motors Corp.* v. *United States*, 496 U.S. 530, 540 (1990).

4. In 1990, the United States, at the request of the EPA, brought this enforcement action against petitioner under the Clean Air Act. Pet. App. 73a-79a. The government contended that petitioner had failed to comply with the VOC limits, in violation of 42 U.S.C. 7410, and had failed to comply with an EPA information request, in violation of 42 U.S.C. 7414. *Ibid.*

Petitioner asserted various affirmative defenses and counterclaims alleging that the VOC limits were invalid under federal and state law.[3] The district court dismissed all of petitioner's so-called "invalidity" defenses and counterclaims. Pet. App. 91a-92a.

The district court subsequently granted the government's motion for summary judgment, concluding that petitioner had violated the Clean Air Act by failing to comply with the VOC limits and with the EPA's information request. Pet. App. 69a-72a. The court imposed civil penalties totalling more than $3 million. *Id.* at 19a.

5. The Ninth Circuit affirmed in part and reversed in part. Pet. App. 34a-45a. The court held that the district court had properly dismissed petitioner's affirmative defenses and counterclaims contesting the validity of the VOC limits, explaining that petitioner had "ample opportunity" to "challenge EPA's approval of the inclusion of those rules in the SIP pursuant to section 307(b)(1) of the [Clean Air Act]," 42 U.S.C. 7607(b)(1). Pet. App. 36a. The court also

---

[3] Petitioner contended that the VOC limits were void as contrary to the California Health and Safety Code, the California Environmental Quality Act, and the state and federal constitutions. See Vista C.A. Br. 17-18, *United States* v. *Vista Paint Corp.*, No. 92-55160 (9th Cir.).

held that the district court had properly granted summary judgment on petitioner's liability under the Clean Air Act for selling and offering for sale non-compliant paint and for failing to comply with the EPA's information request. *Id.* at 37a-38a.

The court of appeals held that summary judgment should not have been granted, however, with respect to the amount of petitioner's civil penalty. Pet. App. 45a. The court remanded the case for trial on various disputed factual issues relating to the appropriate amount of the penalty. Those issues included the economic impact of the penalty on petitioner's business, whether petitioner had made good faith efforts to comply with the VOC limits, the seriousness of petitioner's violations, and whether the penalty should be reduced as a result of the EPA's inaction on the proposed revisions to the VOC limits sub- mitted by the two regional pollution-control districts (see note 2, *supra*). *Id.* at 39a-43a; see 42 U.S.C. 7413(e)(1) (non-exclusive list of factors to be considered by courts in imposing penalties under Clean Air Act).[4]

This Court denied certiorari. 510 U.S. 826 (1993).

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[4] Section 113(e)(1) of the Clean Air Act, 42 U.S.C. 7413(e)(1), provides, in pertinent part, that

> the court * * * shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence * * *, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

6. On remand, the district court held that neither party would bear the burden of proof at the bench trial on issues relating to the amount of the penalty. Pet. App. 87a. The court explained that the determination of an appropriate penalty involved the "weighing and balancing [of] the proper statutory factors and common law factors against the facts which [the court] finds from all the evidence admitted at trial." *Ibid.* The court directed the parties to submit the trial testimony of all direct witnesses by affidavit and to make those witnesses available during trial for cross-examination. *Id.* at 80a-81a.

In April 1996, the district court entered findings of fact and conclusions of law, which determined that petitioner should be assessed a civil penalty of $1,111,250—$559,000 for petitioner's continued sale of non-compliant paint, in violation of 42 U.S.C. 7410, and $552,250 for petitioner's failure to respond to the EPA's information request, in violation of 42 U.S.C. 7414. Pet. App. 4a-33a. The district court separately addressed each of the penalty factors on which the court of appeals had ordered a trial. *Id.* at 24a-32a.

First, the district court concluded that petitioner, as "an expanding business with increasing annual gross sales revenues in the range of 45 to 47 million dollars annually," was fully capable of paying the $1,111,250 penalty. Pet. App. 25a. The court concluded that a penalty of that size would neither "undermine [petitioner's] financial structure" nor "place [petitioner] in jeopardy of 'going-out-of-business.'" *Ibid.*

Second, as for whether petitioner had made good faith efforts to comply with the Clean Air Act, the district court concluded that petitioner had "knowingly and intentionally violated federal law from at

least December 3, 1985, to October 12, 1987" by continuing to sell non-compliant paints, "ignoring during that period repeated warnings by EPA and the June 1987 Notice of Violation." Pet. App. 26a. The court also found that petitioner had made "no real good faith effort" to respond to the EPA's information request. *Ibid.* The court observed that petitioner's "corporate state of mind was to engage in a pattern of continued non-cooperation with [EPA's] enforcement efforts by withholding the documentation of its violations or by providing incomplete information regarding such while it continued to sell and offer to sell non-compliant coatings." *Id.* at 27a.

Third, the district court held that petitioner's violations of the VOC limits were sufficiently serious to warrant a "moderate penalty." Pet. App. 28a. The court explained that "a major reduction in atmospheric pollutants" would have occurred in the affected regions if petitioner had promptly complied with the VOC limits. *Id.* at 27a. But the court declined to find that petitioner's failure to do so had a "measurable negative impact on human health and the environment." *Id.* at 28a. The court also concluded that petitioner's failure to comply with EPA's information request warranted a "moderate to substantial penalty," because the effectiveness of the EPA's enforcement of the Clean Air Act depends in large part on the provision of information from regulated industries such as petitioner. *Ibid.*

Fourth, the district court held that EPA had not engaged in unreasonable delay in reviewing the proposed modifications of the VOC limits submitted by the regional pollution-control districts. Pet. App. 28a-29a. "In any event," the court added, "even if there were unreasonable delays in acting on the

proposed rule revisions, Vista was not prejudiced by them because Vista violated federal law before and after the rule revisions were submitted to EPA." *Id.* at 29a. The court did, however, conclude that the government should have filed suit against petitioner more promptly for non-compliance with the EPA's information request. *Id.* at 30a-31a. The court held that "[s]uch delay supports a moderate reduction in penalty for the period June 21, 1989 to January 18, 1991." *Id.* at 31a.

Finally, as for the statutory penalty factors on which the court of appeals had found no dispute of fact, the district court observed that three of those factors supported a "substantial penalty." Pet. App. 31a-32a. The court stated that petitioner had "a history of non-full compliance," as demonstrated by "the extent and degree" of the violations at issue; that petitioner's violations were of an extended duration, "spann[ing] a period of almost six years"; and that petitioner had "obtained significant economic benefit" from its violations. *Ibid.* As for the final factor, whether petitioner had previously paid penalties for the same violations, the court found that petitioner's prior payments totaled only $500. *Ibid.*

7. The Ninth Circuit affirmed in an unpublished order "for the reasons stated in the district court's Findings of Fact and Conclusions of Law." Pet. App. 2a.

ARGUMENT

The court of appeals' unpublished decisions in this case are correct and do not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. a. Petitioner principally contends (Pet. 8) that the court of appeals erred in its initial decision in this case by holding that a defendant in a civil enforcement proceeding under the Clean Air Act cannot assert as a defense to liability that compliance with a SIP is "economic[ally] or technological[ly] infeasib[le]." But the court of appeals did not so hold. Nor did petitioner ask the court of appeals to rule on whether such a defense is cognizable in a civil enforcement proceeding. This Court does not grant certiorari to "decide questions not raised or resolved in the lower courts." *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992).

Petitioner, in its answer to the government's complaint, asserted as defenses to liability that the VOC limits in the California SIP were invalid as contrary to federal and state law, including the California Health and Safety Code.[5] Petitioner's invalidity

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[5] Petitioner asserted six defenses arguing that the VOC limits were invalid. The first and second invalidity defenses contended that the local pollution-control agencies, in promulgating the VOC limits, "violated the provisions of the California Health and Safety Code relating to rulemaking, the provisions of the California Public Resources Code relating to environmental impact analysis, and the Contract Clauses, the Due Process Clauses, the Takings Clauses, and the Delegation Doctrine under the California and United States Constitutions." Vista Answer ¶¶ 22-25. The third and fourth invalidity defenses contended that the California Air Resources Board, in incorporating the VOC limits into the California SIP, "violated the provisions of the California Health and Safety Code relating to approval or disapproval of local rules as plan portions, the provisions of the California Public Resources Code relating to environmental analysis, and the Contract Clauses, the Due Process Clauses, the Takings Clauses, and the Delegation Doctrine under the California and United States Constitutions." *Id.* ¶¶ 26-29. The fifth and sixth invalidity defenses asserted that the EPA, in approving the VOC limits as part of the

defenses did not, however, refer to infeasibility in any way, much less cite the specific sections of the California Health and Safety Code on which petitioner now relies. The invalidity defenses thus did not fairly raise any issue of technological or economic feasibility. And petitioner did not suggest to the court of appeals in its briefs that the invalidity defenses were predicated on the technological or economic infeasibility of the VOC limits.[6] There is

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California SIP, "violated the provisions of the [Clean Air] Act relating to federal approval or disapproval of state plans, the provisions of the National Environmental Policy Act relating to environmental impact analyses, relevant portions of the Administrative Procedure Act and other applicable laws governing the decision-making of federal administrative agencies, and the Due Process and Takings Clauses of the Fifth Amendment and the Delegation Doctrine under the United States Constitution." *Id.* ¶¶ 30-33.

[6] Petitioner informed the court of appeals that its "affirmative defenses alleged that both 1984 [VOC] rules had 'violated' the [California Health and Safety] Code, the California Environmental Quality Act ('CEQA'), and the state and federal constitutions and were, therefore, 'void *ab initio*.'" Pet. C.A. Br. 17, *United States* v. *Vista Paint Corp.*, No. 92-55160 (9th Cir.). In elaborating on those defenses (*id.* at 28-30), petitioner contended that the local pollution-control agencies (1) did not prepare environmental impact reports with respect to the VOC limits, as required by the CEQA, (2) did not "assess and duly consider the economic impacts [of the VOC limits], as required by law," (3) did not have statutory rulemaking authority over paints sold as consumer products, (4) did not comply with state law requirements that such rules reflect "best available technological and administrative practices," apply "reasonably available" control measures, and be "necessary and proper" (quoting Cal. Health & Safety Code §§ 40440(a), 40462, 40702) (West 1996)); (5) violated the due process clauses of the federal and state constitutions by basing the VOC rules on "crystal-ball gazing" (quoting *International Harvester Co.* v. *Ruckelshaus*,

thus no reason to suppose that the Ninth Circuit's single-sentence holding that "the district court lacked subject matter jurisdiction over * * * the affirmative defenses dealing with invalidity" (Pet. App. 36a) was directed at defenses based on technological or economic infeasibility.

Similarly, in its earlier petition for a writ of certiorari in this case challenging the dismissal of the invalidity defenses, petitioner did not contend that those defenses involved feasibility issues. See Pet. 10-11, 18-20, *Vista Paint Corp.* v. *United States*, No. 92-2026 (9th Cir.) (discussing invalidity defenses). And, in refuting petitioner's assertion of a circuit conflict as to which defenses may be raised in a civil enforcement proceeding under the Clean Air Act, the United States explained that the allegedly conflicting cases involved "claims of economic or technological infeasibility," whereas "the claim in this case is not one of technological or economic infeasibility, but rather of the invalidity of the VOC regulations under state law." U.S. Supp. Br. 13-14, *Vista Paint Corp.* v. *United States*, No. 92-2026. Petitioner did not take issue at that time with the government's characterization of its invalidity defenses as not being based on technological or economic feasibility. The petition for certiorari was denied. 510 U.S. 826 (1993).

b. The only issue fairly raised by petitioner's invalidity defenses, therefore, is whether the VOC limits were promulgated in accordance with the require-

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478 F.2d 615, 623 (D.C. Cir. 1973)); (6) violated the contract clauses of the federal and state constitutions by "severely impair[ing] Vista's contract rights" for no "important public purpose," and (7) did not comply with the state Administrative Procedure Act.

ments of state law (*e.g.*, any requirement that an environmental impact report be prepared, see note 6, *supra*).[7] The court of appeals' decision that such defenses cannot be asserted in a civil enforcement proceeding under the Clean Air Act is correct and consistent with the decisions of other circuits.

Section 307(b)(1) of the Clean Air Act, 42 U.S.C. 7607(b)(1), authorizes judicial review in the courts of appeals of certain actions by the EPA, including its approval of a SIP, and requires that any petition for review be filed within 60 days after notice of the EPA's action appears in the Federal Register. Section 307(b)(2), 42 U.S.C. 7607(b)(2), then provides that any "[a]ction of the [EPA] Administrator with respect to which review could have been obtained under [Section 307(b)(1)] shall not be subject to judicial review in civil or criminal proceedings for enforcement." This Court has recognized that Section 307(b)(2) bars a defendant in a criminal enforcement proceeding for violation of a regulation promulgated under the Clean Air Act from raising various challenges to the validity of that regulation, including "whether the [EPA] Administrator has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the admin-

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[7] Petitioner appears to have abandoned the portions of its invalidity defenses arguing that the EPA's approval of the VOC limits violated various federal constitutional and statutory provisions. See Pet. 6 (describing affirmative defenses as asserting that "the VOC standards contained in the federally approved SIP were invalid because they had been promulgated in violation of California law"); Pet. 9 (noting that "Vista argued below that the VOC standards * * * are invalid on several grounds under California law").

istrative record." *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 285 (1978). And the courts of appeals have uniformly held that Section 307(b)(2) bars a party from challenging the validity of an EPA action in a civil enforcement proceeding—or any other sort of proceeding—on any ground that could have been considered by the EPA in deciding whether to take the action in the first place and by the court of appeals in reviewing the EPA's action under Section 307(b)(1). See, *e.g.*, *United States* v. *Ford Motor Co.*, 814 F.2d 1099, 1103 (6th Cir.), cert. denied, 484 U.S. 822 (1987); *United States* v. *Ethyl Corp.*, 761 F.2d 1153, 1155-1157 (5th Cir. 1985), cert. denied, 474 U.S. 1070 (1986); *Action for Rational Transit* v. *West Side Highway Project*, 699 F.2d 614, 616 (2d Cir. 1983); cf. *Lubrizol Corp.* v. *EPA*, 562 F.2d 807, 813-815 (D.C. Cir. 1977).[8]

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[8] Several circuits agree that issues of technological and economic infeasibility may be raised in a civil enforcement action, because those issues are not properly considered by the EPA in evaluating a SIP. See, *e.g.*, *Union Elec. Co.* v. *EPA*, 593 F.2d 299, 307 (8th Cir.), cert. denied, 444 U.S. 839 (1979); *Indiana & Mich. Elec. Co.* v. *EPA*, 509 F.2d 839, 845 (7th Cir. 1975); *Buckeye Power, Inc.* v. *EPA*, 481 F.2d 162, 173 (6th Cir. 1973), cert. denied, 409 U.S. 1125 (1973). The Third Circuit, however, has held that a defendant cannot raise "economic hardship" as a defense in an enforcement action because it could have raised the issue "in a section 307 hearing." *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349, 357 (3d Cir. 1972). But this Court has recognized since *Getty Oil* that the EPA cannot consider such issues in Section 307(b)(1) proceedings. See *Union Elec.*, 427 U.S. at 265-266. To the extent that any inconsistency ever existed between *Getty Oil* and the decisions of the Sixth, Seventh, and Eighth Circuits, it was over whether economic hardship could be raised in a Section 307(b)(1) proceeding. There was no disagreement over the basic principle that a party is barred from raising in a civil enforcement action any

The Ninth Circuit's decision that the district court lacked jurisdiction over petitioner's invalidity defenses is consistent with those decisions. In determining whether to approve the California SIP, the EPA could have considered petitioner's arguments that the VOC limits were promulgated in violation of state law, because States must provide the EPA with assurances that they have the authority under state law to carry out a SIP. 42 U.S.C. 7410(a) (2)(E). And the court of appeals could then have considered that issue on a petition for review under Section 307(b)(1) challenging the EPA's approval of the California SIP. Accordingly, because petitioner could have raised its claim that the VOC limits are contrary to state law on a petition for review under Section 307(b)(1), the district court was without jurisdiction to consider such a claim in a civil enforcement proceeding.[9]

c. Petitioner also argues (Pet. 12-14) that defendants in civil enforcement proceedings under the Clean Air Act cannot constitutionally be precluded from challenging the validity of a SIP requirement. But no such constitutional challenge to Section 307(b)(2) was presented to or addressed by the courts

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question that a court of appeals could have considered in a Section 307(b)(1) proceeding. In any event, this case does not implicate any conflict over when issues of economic or technological feasibility may be raised, because, as explained above, petitioner did not argue below that its invalidity defenses were based on such issues.

[9] Petitioner could likewise have raised in a Section 307(b)(1) proceeding its arguments that the EPA, in approving the VOC limits, violated the Clean Air Act, the National Environmental Policy Act, the Administrative Procedure Act, and various provisions of the United States Constitution. See *Lloyd A. Fry Roofing Co.* v. *EPA*, 554 F.2d 885, 892 (8th Cir. 1977).

below. Nor has petitioner identified *any* decision of *any* court holding Section 307(b)(2) (or any similar statutory provision) to be unconstitutional. See generally *Yakus* v. *United States*, 321 U.S. 414 (1944) (upholding constitutionality of statute precluding challenges to validity of price controls in enforcement proceedings); *Lloyd A. Fry Roofing Co.* v. *EPA*, 554 F.2d 885, 892-893 (8th Cir. 1977) (rejecting argument that precluding challenges to validity of EPA regulations outside time period allowed by Section 307(b)(1) violates due process).

Moreover, to the extent that petitioner's challenge to the VOC limits was actually based (as petitioner now contends) on issues of technological and economic feasibility, petitioner was free to raise such issues during the penalty phase of the case in an effort to show "good faith efforts to comply" with the VOC limits. See 42 U.S.C. 7413(e)(1) (listing penalty factors); see also *Ford Motor Co.*, 814 F.2d at 1104 ("technical infeasibility coupled with good faith efforts can be considered by the district court as a factor mitigating against the imposition of monetary penalties in the enforcement action"). The Ninth Circuit's initial opinion in this case addressed only the defenses that petitioner could raise to liability. That ruling had no legal or practical effect on petitioner's ability to attempt to persuade the district court on remand that little or no penalty should be imposed because its compliance with the SIP was technologically or economically infeasible. And neither the district court nor the Ninth Circuit subsequently held that feasibility issues could not be considered in mitigation of any penalty.

2. Petitioner next urges (Pet. 17) the Court to resolve a "conflict of authority" as to the allocation of

the burden of proof on the various factors that Section 113(e)(1) of the Clean Air Act, 42 U.S.C. 7413(e)(1), directs the district courts to consider in determining the amount of a penalty. But no such conflict exists.

In this case, the district court held (Pet. App. 87a), and the court of appeals agreed (*id.* at 2a), that neither party bore the burden of proof on the Section 113(e)(1) penalty factors.[10] Instead, the district court concluded (*id.* at 87a) that it should "receive[] admissible evidence from both sides," "weigh[] and balanc[e] the proper statutory and common law factors against the facts which it finds from all the evidence admitted at trial," and then "exercise[] its discretion in determining the amount, if any, of the penalty." Cf. *Tull* v. *United States*, 481 U.S. 412, 427 (1987) (recognizing that district courts must engage in "highly discretionary calculations that take into account multiple factors" in setting civil penalties under the Clean Water Act).

Petitioner has identified no decision that adopts a position contrary to that of the courts below on the allocation of the burden of proof under Section 113(e)(1). None of the appellate decisions cited by petitioner even addresses the burden of proof. Petitioner does cite two district court decisions that declined to require a defendant to bear the burden of proving that its penalty should be less than the statutory maximum.[11] But those decisions are

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[10] Because the district court held that "there is no burden of proof on either party" with respect to the Section 113(e)(1) penalty factors (Pet. App. 87a), petitioner was not, as it contends (Pet. 16), "saddled with the burden of proving facts to *rebut* the maximum penalty requested by the Government."

[11] See *United States* v. *Midwest Suspension & Brake*, 824 F. Supp. 713, 735 n.30 (E.D. Mich. 1993), aff'd, 49 F.3d 1197

entirely consistent with the decision in this case, which likewise held that petitioner did not bear the burden of proof on the amount of its penalty.[12] In short, petitioner has offered no authority under Section 113(e)(1) of the Clean Air Act, or any parallel provision of any other environmental statute, adopting its view that the courts below should have "place[d] squarely on the Government the burden of proving the facts underlying the penalty factors" (Pet. 17).

Petitioner also seizes on the district court's statement that "[t]his Court will first determine the maximum penalty allowable and then consider any mitigating circumstances" (Pet. App. 22a), asserting that the district court thereby "presumptively appl[ied] the maximum penalty and require[d] [petitioner] to prove facts in mitigation" (Pet. 16). But petitioner is reading more into the district court's statement than its words or their context can bear. It is evident from the entirety of the district court's opinion, and from its holding, that no presumption was made that the statutory maximum penalty should apply. The court found that most of the Section 113(e)(1) factors favored a "substantial" penalty. See Pet. App. 25a-

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(6th Cir. 1995); *Student Public Interest Research Group of New Jersey, Inc.* v. *Monsanto Co.*, Civ. A. No. 83-2040, 1988 WL 156691, at *16 (D.N. J. Mar. 24, 1988) (citizen suit not involving Section 113(e)(1) penalty factors).

[12] Indeed, the district court in one of those cases, in words strikingly similar to those of the district court here, explained that "the inquiry mandated under [42 U.S.C.] § 7413(e) is for this Court to evaluate the penalty assessment criteria in light of all of the evidence introduced at trial, not merely the evidence a defendant introduces at trial." *Midwest Suspension*, 824 F. Supp. at 735 n.30.

28a, 31a-32a. Yet, the court imposed penalties ranging from $250 to $2500 per day of violation— *i.e.*, from one percent to ten percent of the statutory maximum of $25,000 per day of violation. *Id.* at 39a; 42 U.S.C. 7413(d)(1).

Nor would the district court's statement, even if read in the manner that petitioner suggests, create a conflict among the circuits. The courts of appeals are in agreement that "[i]n considering fines under the Act, courts generally presume that the maximum penalty should be imposed." *United States* v. *B & W Inv. Properties*, 38 F.3d 362, 368 (7th Cir. 1994), cert. denied, 514 U.S. 1126 (1995); accord *United States* v. *Marine Shale Processors*, 81 F.3d 1329, 1337 (5th Cir. 1996) ("when imposing penalties under the environmental laws, courts often begin by calculating the maximum possible penalty, then reducing the penalty only if mitigating circumstances are found to exist"); *Atlantic States Legal Found., Inc.* v. *Tyson Foods, Inc.*, 897 F.2d 1128, 1137 (11th Cir. 1990). None of the district court decisions that petitioner cites as conflicting holds that such an approach is impermissible.[13] And one of those decisions itself adopts such an

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[13] For example, the court in *United States* v. *Smithfield Foods, Inc.*, 972 F. Supp. 338, 353 (E.D. Va. 1997), noted that some courts, including the Eleventh Circuit in *Tyson Foods*, have used "the 'top down' method of penalty calculation, in which the court begins the penalty calculation at the statutory maximum, and adjusts downward considering the [statutory] factors," whereas some district courts have used "the 'bottom-up' method of penalty calculation, in which the court begins the penalty calculation using defendants' economic benefit of noncompliance, and adjusts upward or downward considering the [statutory] factors." After concluding that "the statute does not require either the 'top-down' or the 'bottom-up'

approach. See *United States* v. *Midwest Suspension & Brake*, 824 F. Supp. 713, 735 (E.D. Mich. 1993) ("in calculating the amount of civil penalties to be imposed on defendant [under the Clean Air Act], this Court must start with the statutory maximum and make any downward adjustments based on the evidence adduced at trial"), aff'd, 49 F.3d 1197 (6th Cir. 1995).

In any event, even if one assumes *arguendo* that the lower courts erred in not requiring the government to bear the burden of proof on all of the Section 113(e)(1) penalty factors, petitioner has not even attempted to demonstrate that any such error was prejudicial in this case. The burden of proof is dispositive in a civil case only in those relatively rare circumstances where the parties' evidence is in equipoise. Cf. *Medina* v. *California*, 505 U.S. 437, 449 (1992). Nothing in the district court's decision suggests that the evidence was in equipoise on any of the Section 113(e)(1) penalty factors. It thus appears that the district court would have reached the same conclusion on the amount of petitioner's penalty regardless of whether the burden of proof was placed on the government, on petitioner, or on neither party.

3. Finally, petitioner complains (Pet. 15-20) that the district court abused its discretion in its conduct of the trial on the Section 113(e)(1) penalty factors, because the court required the parties to submit the testimony of their direct witnesses by affidavit rather than in person. The court also required, however, that those witnesses be made available at trial for cross-examination. See Pet. App. 80a-81a. As the courts of appeals have recognized, "[a] district court's

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method," the court chose, as an exercise of its "discretion," to use the "bottom-up" method. *Id.* at 353-354.

requirement that parties submit direct evidence in written form, while permitting parties to cross-examine adverse witnesses orally," is "an accepted and encouraged technique for shortening bench trials." *Ball* v. *Interoceanica Corp.*, 71 F.3d 73, 77 (2d Cir. 1995) (quoting *Phonetele Inc.* v. *American Tel. & Tel. Co.*, 889 F.2d 224, 232 (9th Cir. 1989), cert. denied, 503 U.S. 914 (1992)); see also *Eirhart* v. *Libbey-Owens-Ford Co.*, 996 F.2d 837, 840 (7th Cir. 1993) (district courts may conduct bench trials on "a written record").

Petitioner nonetheless contends (Pet. 17-20) that such a procedure is inconsistent with Rule 43(a) of the Federal Rules of Civil Procedure, which provides that "[i]n every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise." Rule 43(a), by its terms, thus gives way in the face of inconsistency with, *inter alia*, the Federal Rules of Evidence. The courts have construed Federal Rule of Evidence 611(a), which gives trial courts broad authority over "the mode and order of interrogating witnesses" in order to "avoid needless consumption of time," as permitting the introduction of direct testimony in the form of affidavits at bench trials. See, *e.g.*, *In re Adair*, 965 F.2d 777, 779-780 (9th Cir. 1992); *Saverson* v. *Levitt*, 162 F.R.D. 407, 408-409 (D.D.C. 1995).

Petitioner claims (Pet. 19-20) that several cases are in conflict with *Adair*, *Ball*, and the decision below. But there is no true circuit conflict. None of the appellate cases relied on by petitioner concerned a district court's order that the parties submit their witnesses' direct evidence by affidavit at a bench trial

while making the witnesses available in person for cross-examination. Two of those cases reversed a district court's grant of summary judgment, based on affidavits or other evidence, where various genuine disputes of material fact appeared to exist. See *Ross* v. *Franzen*, 777 F.2d 1216, 1220-1221 (7th Cir. 1985); *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 430-434 (2d Cir. 1974).[14] Those cases are obviously not on point. Both the Second Circuit and the Seventh Circuit have since approved of trial procedures similar to those used in this case. See *Ball*, 71 F.3d at 76; *Eirhart*, 996 F.2d at 840.

A third case held that a district court could not conduct the trial of a prisoner's civil-rights suit "solely on affidavits," especially in circumstances where the prisoner was entitled to a trial by jury. See *Dolence* v. *Flynn*, 628 F.2d 1280, 1281-1282 (10th Cir. 1980). *Dolence* is distinguishable from the present case in at least two respects. The trial of this case was not conducted "solely on affidavits," because the witnesses were subject to live cross-examination. And the issues in this case were triable to the court rather than to a jury. A district court is allowed more latitude over the manner in which evidence will be introduced at a bench trial as opposed to a jury trial. See, *e.g.*, *Southern Pacific Transp. Co.* v. *Chabert*, 973 F.2d 441, 448 (5th Cir. 1992), cert. denied, 507 U.S. 987 (1993). Similar reasons distinguish the present case from *Lebeck* v. *William A. Jarvis, Inc.*, 250 F.2d 285, 294-295 (3d Cir. 1957), which held that a district court should not have read an edited transcript of a witness's testimony to the jury, but in-

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[14] Petitioner relies on a footnote in *J.B. Williams*, 498 F.2d at 430 n.19, that consists essentially of dicta.

stead should have required the witness to testify in person.

The case most analogous to this one is *Walton* v. *United Consumers Club, Inc.*, 786 F.2d 303, 312-313 (7th Cir. 1986), which concluded that a district court should not have admitted the plaintiffs' interrogatory answers at a bench trial in lieu of live testimony, even though the plaintiffs were subject to cross-examination about those answers. But the court of appeals in that case did not consider the relationship between Rule 43(a) of the Federal Rules of Civil Procedure and Rule 611(a) of the Federal Rules of Evidence. And, in any event, the court of appeals ultimately held that the admission of the affidavits was harmless and consequently did not require reversal. 786 F.2d at 313. There is thus no tension in the outcomes of *Walton* and the present case. Petitioner has not even attempted to demonstrate any prejudice resulting from the district court's mode of obtaining witnesses' testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VISTA PAINT CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE ENVIRONMENTAL, LEGISLATIVE, AND REGULATORY ADVOCACY PROGRAM OF THE CALIFORNIA PAINT AND COATINGS INDUSTRY ALLIANCE IN SUPPORT OF THE PETITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1897

VISTA PAINT CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE ENVIRONMENTAL, LEGISLATIVE, AND REGULATORY ADVOCACY PROGRAM OF THE CALIFORNIA PAINT AND COATINGS INDUSTRY ALLIANCE IN SUPPORT OF THE PETITION

INTEREST OF *AMICUS CURIAE* [1]

The Environmental, Legislative, and Regulatory Advocacy Program of the California Paint and Coatings Industry Alliance ("EL RAP") is a trade organization whose membership is composed of local or regional coat-

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[1] This brief *amicus curiae* is being filed with the written consent of both petitioner and respondent. As required by United States Supreme Court Rule 37.2, letters evidencing such consent are being simultaneously filed with the Clerk of the Court. Further, pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored the brief in whole or in part and no person or entity other than *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of the brief.

ings manufacturers, dealers, contractors, suppliers of raw materials, equipment, and services to the paint industry, and organized labor. EL RAP's approximately 75 members make, sell, and use a major share of the paints and coatings in California.

In the case at bar, the majority of the civil penalty assessed against Vista Paint Corporation ("Vista"), one of EL RAP's members, was for sales of architectural coatings containing organic compounds in excess of a limit imposed initially by local agencies and thereafter approved by a state and then a federal agency. Although the effective date of the limit forming the basis of the federal enforcement action had been subsequently extended by the local and state agencies, Vista was precluded from asserting the original invalidity of that limit under state law as a defense to the federal enforcement action. The amendment of a local district rule, a variance therefrom, or the judicial invalidation thereof is not uncommon. However, EL RAP members have no capacity, as a practical matter, to monitor, let alone challenge, hundreds of local, state, and federal actions taken to adopt and approve the continual stream of rule amendments and plan revisions affecting their products. Indeed, sustaining such challenges is often legally impossible. Without the ability to challenge the validity of the underlying local and state regulations as a defense to a federal enforcement action, these companies will be effectively precluded from ever asserting such claims.

Accordingly, EL RAP's members have a strong interest in resolving the important question, on which the circuits are split, of whether Section 307(b)(2) of the Clean Air Act ("CAA") may be interpreted to preclude such a defense and, if so, whether doing so comports with fundamental principles of due process.

STATEMENT OF THE CASE

Hundreds of varieties of organic compounds are emitted from thousands of consumer and commercial products.

Different types of organic compounds have greatly differing degrees of volatility and of reactivity and, hence, the ability to promote the accumulation of ground level ozone. Whether, and the extent to which, any organic compound promotes ozone formation also depends on numerous environmental factors such as ambient temperature, the mix of organic compounds, and the ratio thereof to oxides of nitrogen, the direct precursor of ozone.[2] The type of organic compound in solvent-borne paints is typically mineral spirits, whereas the type in water-borne paints is typically glycol compounds. App. 48a.

Respondent U.S. Environmental Protection Agency ("EPA") recognizes more than 50 separate categories of architectural coatings. Each has been regulated by more than a score of local air quality districts and one state agency established in California to implement clean air legislation. Thus, literally hundreds of combinations and permutations of rulemaking are possible.

Here, the District Court assessed, among other things, a civil penalty of $559,000 against Vista for violations of the CAA based on sales after September 1, 1985 and before October 12, 1987 in two local districts of solvent-borne enamel house paint containing more than 250 grams per liter ("g/l") of organic compound.[3] Although each of Vista's penalized sales complied with the limit under the extended deadline of local and state regulations, EPA nevertheless subjected Vista to federal enforcement of the limit in effect under the prior deadline.

The District Court held at the pleading stage that it lacked jurisdiction over Vista's affirmative defenses against EPA and claims against the local and state agencies alleg-

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[2] See National Research Council, *Rethinking The Ozone Problem in Urban and Regional Air Pollution* (National Academy Press, Washington, D.C., 1992)

[3] The penalty was $500 per day prior to June 24, 1987 (the day 40 companies, including Vista, received notices of violation) and $2,500 per day thereafter. App. 33a.

ing the initial invalidity of the limit under state law. App. 89a-93a. The Ninth Circuit affirmed in the first of two appeals, holding that Vista had "ample opportunity" to comment on and challenge EPA's approval thereof under CAA Section 307. App. 15a, 36a.

EL RAP respectfully submits that, for the reasons stated below, this Court should grant certiorari to decide this important jurisdictional question. There is a conflict among the circuits as to the proper interpretation of Section 307, and that split should be resolved. Furthermore, if the preclusive interpretation followed by the Ninth Circuit is applied, significant due process questions arise.

LEGAL ARGUMENT

I. WHILE THE STATE RULES WERE ADOPTED AND APPROVED IN VIOLATION OF STATE LAW, THEY COULD NOT HAVE BEEN INVALIDATED IN STATE COURT.

Vista argued during the initial phase of the case that the limits it was found to have violated originally "had been promulgated in violation" of state law and were, therefore, "invalid." Pet. 6, 9. EL RAP invites the Court's attention to the facts that (a) the two rule amendments relating to architectural coatings at issue here were invalidly adopted and approved under state law, and (b) it is virtually certain that no EL RAP member could have mounted a successful challenge to the validity of such amendments in state court.

By way of background, the process California has employed to regulate architectural coatings during the past two decades is complex. First, local rules are adopted and amended, and enforced at the local level, by more than a score of county or regional air districts. Second, each district follows the so-called "technology-forcing" approach to such rulemaking. Third, each district has tended to amend its rule on a frequent basis. Fourth, every rule amendment adopted by every district is sub-

mitted to the California Air Resources Board ("ARB") for approval as state law. Fifth, ARB then submits them to EPA for approval as federal law. As discussed below, the interaction of these five factors bears significantly on the issues of concern to EL RAP.

A. The Local Rule Amendments Were Adopted By The Districts Unlawfully, But Were Not Judicially Voidable.

South Coast Air Quality Management District ("South Coast AQMD") first adopted its Rule 1113 regulating the organic compound content of architectural coatings in 1978. App. 49a. Rule 1113 was amended by South Coast AQMD on a roughly annual basis thereafter. Rule 1113 govers numerous categories of architectural coatings and prohibits the manufacture, sale or use of each such category over a certain limit of organic compounds. App. 5a. One such category is so-called "non-flat" coatings, or glossy enamels used on windows and doors and in kitchens and bathrooms. App. 5a. During the early years South Coast AQMD had experimented with several non-flat limits, including 450 g/l, which required reformulation of only a few non-flat products, and 250 g/l, which would effectively have outlawed most solvent-borne such products. In 1981, however, a compromise limit of 380 g/l was adopted for the near term, which required most non-flats to be reformulated, but still allowed merchantable products to be made, sold, and used. App. 20a. Since 1981, amendments to South Coast AQMD Rule 1113 retained the 380 g/l limit in the near term, but simultaneously adopted the "technology forcing" limit of 250 g/l to become effective at a future date. App. 52a, 53a.

Of particular relevance here, on March 16, 1984, South Coast AQMD adopted its ninth version of Rule 1113, which prohibited the sale or use of any non-flat coating exceeding the 380 g/l limit until September 1, 1985, but the 250 g/l limit thereafter. App. 5a.

During the late 1970s and early 1980s San Diego Air Pollution Control District ("San Diego APCD") followed the same pattern. San Diego APCD's 1984 amendment to its Rule 67.0 was substantially identical to that adopted by South Coast AQMD. In particular, it also fixed the 380 g/l limit for non-flat coatings until September 1, 1985, but the 250 g/l limit thereafter. App. 5a.

There are more than 20 other air districts in California in addition to South Coast AQMD and San Diego APCD. During the late 1970s and early 1980s many of them were simultaneously following the same regulatory approach. They also took actions similar to those taken by South Coast AQMD and San Diego APCD in early 1984.

After adoption of the two rule amendments in question, this pattern continued throughout California. In particular, districts repeatedly amended their architectectural coating rules, among other things, to extend the effective date of the drop in the non-flat limit from 380 g/l to 250 g/l. Thus, EL RAP members have been affected by the outcome of roughly 100 different local rulemaking proceedings during the past 20 years.[4]

This Court recognizes the role of state law in implementing the CAA. It stated in *Union Electric Co. v. EPA*, 427 U.S. 246, 266 (1976) (*"Union Electric I"*), as follows: "Perhaps the most important forum for consideration of claims of economic and technologic infeasibility is before the state agency formulating the implementation plan." During most of the major local rulemakings, including the two at issue here, EL RAP members did present substantial evidence and argument about the economic and technological infeasibility of the future-effective 250

[4] As discussed below, each such amendment, in turn, was subjected to two further administrative reviews, one by ARB and then another by EPA. Accordingly, EL RAP members have had an interest in approximately 300 rulemaking proceedings during this period.

g/l limit for non-flats. District boards well understood that that future-effective limit was infeasible, but retained it as a spur to possible technological development.

As further stated in *Union Electric I*, ". . . an industry denied an exemption from the implementation plan, or denied a subsequent variance, may be able to take its claims of economic and technological infeasibility to the state courts. [citations]" 427 U.S. at 266-67. Such legal claims existed with respect to the future-effective 250 g/l limit, including the limit contained in South Coast AQMD's and San Diego APCD's early 1984 rule amendments. Pet. 6, 9.

For example, in 1984 the California Environmental Quality Act ("CEQA"), mandated that an agency analyze the adverse environmental impacts of any project. Cal.Pub.Res. Code § 21000 *et seq.* Neither South Coast AQMD nor San Diego APCD prepared a report analyzing the significant adverse environmental impacts of the non-flat ban scheduled to take effect September 1, 1985. Accordingly, those technologically infeasible bans of non-flat paints were voidable under CEQA. *Dunn-Edwards Corp. v. Bay Area Air Quality Management District*, 9 Cal. App. 4th 644, 653-58 (1992) (". . . [T]he new regulations require lower quality products. As a result, more product will be used, which will lead to a net increase in VOC emissions.").

Similarly, an air district was required to analyze the economic impacts of any rule amendment. *Western Oil & Gas Assoc. v. ARB*, 37 Cal.3d 502, 517, 518, 520, 524 (1984).[5] Neither South Coast AQMD nor San Diego APCD assessed the economic impacts of the future-

[5] Since 1984 the California Legislature has repeatedly clarified and enhanced this duty. Cal. Health & Safety Code §§ 40440, 40440.8, 40440.11, 40703, 40728.5, 40922; *Alliance of Small Emitters/Metals Industry v. South Coast AQMD*, 60 Cal. App. 4th 55, 64 (1997).

effective non-flat ban. Accordingly, the economically infeasible 250 g/l limits were unlawful on this ground, as well.

EL RAP members did not bring state court suits to challenge South Coast AQMD's or San Diego APCD's future-effective ban of non-flat coatings in the 1984 rule amendments. It would have been impractical to mount such challenges and, had they done so, any such claims of invalidity would have been mooted by subsequent corrective action at the administrative level.

Prior to effectiveness of the scheduled drop on September 1, 1985 of the non-flat limit to 250 g/l, South Coast AQMD, as had been its consistent pattern in the past, again amended Rule 1113, this time extending the deadline four years to September 1, 1989. App. 20a.

At about the same time, San Diego APCD made the same correction by, first, amending the rule and, second, granting the paint industry a class variance, which together had the effect of extending the then-scheduled ban on non-flats to August 31, 1987.[6] App. 11a-12a, 20a, 53a.

At all times between March 1984 and mid-1985 it was entirely reasonable for EL RAP members to refrain from instituting state court suits against South Coast AQMD, San Diego APCD, and other districts. Indeed, instituting multiple protective litigations at that time would have been highly impracticable. Corrective action at the administrative level had always been taken before. Indeed, corrective actions were again taken in 1985, either in the form of further rule amendments, or variances.

In any event, even if EL RAP members had instituted multiple protective lawsuits prior to mid-1985, those suits

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[6] On August 31, 1987 Vista applied for a further variance. The hearing board of the San Diego APCD later denied that variance and on October 12, 1987 Vista relented. App. 11a-12a.

would have become moot upon the occurrence of such corrective actions and could not have been maintained thereafter. *Paul v. Milk Depots, Inc.*, 62 Cal.2d 129, 133-34 (1964).

B. The Local Rule Amendments Were Approved By ARB Unlawfully, But Were Not Judicially Voidable.

ARB is bound to review all district rule amendments and variances to determine whether they meet the requirements of both state and federal law and, if so, approve them for inclusion in the state plan. Cal. Health & Safety Code §§ 39602, 41500(b), 41504(a), 41650(a), 41652. The early 1984 amendments to South Coast AQMD's Rule 1113 and San Diego APCD's Rule 67.0, including the September 1, 1985 bans of non-flat coatings, were reviewed and approved by ARB in 1984.

EL RAP contends that each such ARB approval was a "project" subject to environmental review under CEQA. *Bozung v. Local Agency Formation Commission*, 13 Cal.3d 249, 277-79, 285 (1975); *Fullerton Joint Union High School District v. State Board of Education*, 32 Cal.3d 779, 794-97 (1982). ARB did not prepare any report analyzing the significant adverse environmental impacts of the two approvals at issue. *Dunn-Edwards*, 9 Cal. App. 4th at 658. Thus, ARB's approvals of the two rule amendments in question was unlawful and voidable under CEQA.

ARB is also bound to analyze the economic impacts of any regulation. Cal. Government Code §§ 11346.14, 11346.4, 11346.5, 11346.53, 11346.55, 11346.7. EL RAP contends that each such approval constitutes the adoption of a "regulation" subject to economic analysis. *Id.* at §§ 11342(b), 11346, 11347.5; *State Water Resources Control Board v. Office of Administrative Law*, 12 Cal. App. 4th 697, 700-03 (1993). ARB did not analyze the

economic impacts of either approval at issue. Accordingly, each was voidable on this basis, too.

ARB subsequently approved the districts' corrective rule amendments and variances. Once those approvals occurred, any claims against ARB challenging the prior approvals would have become moot and could not have been prosecuted.

II. EPA'S APPROVALS OF THE TWO PLAN REVISIONS WERE NOT CHALLENGEABLE IN A PETITION FOR REVIEW IN THE NINTH CIRCUIT BASED ON THE ORIGINAL STATE LAW VIOLATIONS.

In 1984 ARB submitted to EPA various plan revisions, including the two at issue here, for review and approval under Sections 110 and 172 of the CAA, as then in effect. 42 U.S.C. §§ 7410, 7502 (1977), amended 1990. On July 24, 1985 EPA approved those submissions. App. 6a.

EL RAP members could not have challenged EPA's approvals of the two non-flat bans in a Ninth Circuit petition for review under Section 307. Neither Section 110 nor 172 authorized EPA to review plan revisions for technological or economic infeasibility.

As stated by this Court in *Union Electric I*, ". . . claims of economic or technological infeasibility may not be considered by the Administrator in evaluating a state reqiurement . . ." 427 U.S. at 265. Thus, as Vista correctly states, ". . . claims of economic and technological infeasibility are beyond the EPA's authority to consider in the SIP approval process . . ." Pet. 11.[7]

As also held by this Court, it necessarily follows that "a court of appeals reviewing an approved plan . . .

[7] The Ninth Circuit was manifestly incorrect in holding that Vista had "ample opportunity" to submit comments to EPA about the infeasibility of the bans. App. 36a.

cannot set it aside on those gorunds, no matter when they are raised." *Union Electric I*, 427 U.S. at 265-66. Accordingly, an EL RAP member ". . . could not have raised such challenges involving economic and/or technological feasibility in a direct challenge to the EPAs adoption of the California SIP." Pet. 9.[8]

Even if the CAA and its interpretation by this Court were otherwise, any rights EL RAP members might arguably have had to object to, or challenge, EPA's approvals would not have been "meaningful." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). This Court has recognized just how limited one's opportunity is to comment upon and challenge EPA approvals of plan revisions.

As noted by the court in *Adamo Wrecking Co. v. U.S.*, 434 U.S. 275, 283 n.2 (1978):

> "The severity of the scheme is accentuated by the fact that persons subject to the Act, including innumerable small businesses, may protect themselves against arbitrary administrative action only by daily perusal of proposed emission standards in the Federal Register and by immediate initiation of litigation in the [appropriate circuit] to protect their interests."

Justice Powell, in his concurring opinion in *Adamo Wrecking*, questioned whether this procedure passed muster under the due process clause, saying: "No notice is afforded . . . other than publication of the Administrator's action in The Federal Register." *Id.* at 289. He further noted:

> "[T]here is no more assurance that notice of proposed standards will come to the attention of the thousands of persons and entities affected than that notice of their actual promulgation will. Neither is it realistic to assume that more than a fraction of these

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[8] Again, the Ninth Circuit was clearly wrong when it ruled that Vista had "ample opportunity" to challenge EPA's approvals. App. 36a.

> persons and entities could afford to follow or participate in the Administrator's hearing." *Id.* at 289 n.1.

Justice Powell added:

> "The . . . [short time] limitation on judicial review imposed by the Clean Air Act would afford precariously little time for many affected persons even if some adequate method of notice were afforded. It also is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation—especially small contractors scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register." *Id.* at 290.

In *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 n.9 (1980) this Court noted the above due process issue but said that, since it was not at issue in that case, it "must . . . await another day." In another concurring opinion, Justice Powell repeated his "reservations about the constitutionality of the notice and review preclusion provisions of § 307(b). [citation]" *Id.* at 594. He wrote: ". . . [P]ublication in the Federal Register still is unlikely to provide constitutionally adequate notice that a failure to seek immediate review will bar affected parties from challenging the noticed action . . ." *Id.*

Vista correctly states that, at the time of EPA review and approval, ". . . the precise interests of all who might be affected are hypothetical and unfocused." Pet. 12. It further argues:

> "The opportunity to challenge a regulation at the time the EPA adopts a SIP is no opportunity at all, as most potential targets of that regulation are unaware that it may eventually be enforced against them. Vista, for one, does not (and cannot afford to) pay a staff of lawyers to comb through the Federal Register every day to see if any of its interests might be affected by revisions to a SIP." Pet. 13.

When EPA reviewed and approved the two plan revisions at issue in late 1984 and early 1985, most EL RAP

members were undoubtedly unaware that it was doing or had done so. App. 48a. Even if they acquired such knowledge, they would reasonably have believed, as had always happened in the past, that South Coast AQMD and San Diego APCD would correct the scheduled but infeasible non-flat bans by administrative action, that ARB would approve those corrective actions, and that EPA would also again do so, as well.[9] Even if any member had known of EPA's early 1985 approvals of the two plan revisions at issue, and deemed it prudent to attempt suit in the Ninth Circuit out of an abundance of caution, no member could have afforded the cost of multiple protective litigations.

In short, Section 307 provided EL RAP members with no remedy at all for the prior failures of the districts and ARB to assess technological and economic infeasibility, as mandated by state law. And, if it had, the remedy would have been constitutionally insufficient.

III. THE FIRST TIME TO RAISE STATE LAW INVALIDITY ISSUES WAS AS A DEFENSE TO AN EPA ENFORCEMENT ACTION.

As shown above, EL RAP members, including Vista, could not have invalidated the non-flat bans in question in either state or federal court. The first opportunity Vista had to raise these violations was in EPA's enforcement action.

In 1973 the Sixth Circuit held that claims of state law invalidity based on technological and economic infeasi-

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9 As it turned out, to the great surprise of EL RAP members, EPA stealthily changed policy. For two years, between mid-1985 and mid-1987 EL RAP members openly sold non-flat coatings throughout California, believing such sales to be lawful. EPA shocked the entire industry when it issued notices of violation to 40 companies on June 24, 1987 asserting that all of those sales had violated federal law. App. 13a, 21a, 48a-50a. EPA ultimately denied approval of South Coast AQMD's corrective amendment in 1989. App. 20a. It never passed on San Diego APCD's corrective actions. App. 20a.

bility can be asserted as a defense in a federal enforcement proceeding. *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 165, 173 (6th Cir. 1973). Two years later the Seventh Circuit followed suit. *Indiana & Michigan Electric Co. v. EPA*, 509 F.2d 839, 844-45 (7th Cir. 1975). In *Union Electric I*, this Court noted *Buckeye Power* and *Indiana & Michigan Electric*, but declined to address the question. 427 U.S. at 268 n.18. In two cases decided during the late 1970's the Eighth Circuit followed that rule. *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885, 891 (8th Cir. 1977); *Union Electric Co. v. EPA*, 593 F.2d 299, 304, 306, 307 (8th Cir. 1979).

In the case at bar, however, the Ninth Circuit joined another circuit in broadly—and, EL RAP contends, erroneously—construing Section 307(b)(2) to preclude such a defense. Thus, there exists a clear conflict of the circuits on this important point. EL RAP contends that a circuit conflict exists, this Court should resolve it, and the rule followed in the Sixth, Seventh and Eighth Circuits is the correct one for three reasons, discussed below.

A. Section 307(b)(2) Does Not Preclude The Defense.

As shown in Vista's petition and above, neither Section 110 nor Section 172 of the CAA authorized EPA to consider technological or economic infeasibility. Accordingly, EPA's 1985 approval of each non-flat ban in question was not "[a]ction" of a type for which "review could have been obtained" in a Ninth Circuit petition for review under Section 307(b)(1). Therefore, Vista "could not have raised such challenges . . . in a direct challenge." Pet. 9.

Because Vista could not have filed a circuit court petition under Section 307(b)(1) claiming that EPA had violated Sections 110 and 172, an important question exists, over which the circuits are surely divided, as to whether Vista was precluded under Section 307(b)(2) from raising its invalidity defenses in EPA's later enforce-

ment suit. This Court should grant certiorari to decide this important question, and if granted, apply the correct statutory interpretation followed in the Sixth, Seventh, and Eighth Circuits.

B. If Interpreted Preclusively, Section 307(b)(2) Violates The Due Process Clause.

If Section 307 were interpreted preclusively, judicial review would not be meaningful nor, therefore, meet due process requirements. As Vista correctly states: ". . . [T]he most meaningful time to be heard" is at the enforcement stage when a company's "interests in the validity of a regulation become concrete." Pet. 12-13.

If the statutory interpretation of the Ninth Circuit is correct, the important due process question previously noted by Justices of this Court should be resolved, and the particularly stark facts of this case provide an opportune setting for doing so.

The necessary implication of the ruling challenged in the instant petition is that EL RAP members should have been digging deep into their pockets (and, consequently, court budgets) and instituting 100 protective state court suits against local districts every time they adopted a technologically and economically infeasible future-effective technology-forcing limit, and 100 more suits every time ARB approved it. Even if this strategy were affordable at all, it would have led to nothing but waste, as each of the 200 state court suits would have been mooted by subsequent corrective actions voluntarily taken by the districts and ARB. Thus, the theoretical possibility of state court suits is not constitutionally meaningful.

Nor would 100 additional petitions for review of EPA's approvals in the Ninth Circuit have been meaningful. Even if EL RAP members were assumed to have known about the EPA proceedings and approvals and to have been able to afford to participate in the former and challenge the latter (both unrealistic assumptions), such suits would also have been later mooted by EPA's approval of

state corrective actions—except the two corrective actions taken here. To everyone's surprise, EPA did not act upon the South Coast AQMD measure until 1989 and then disapproved it. EPA never acted on the corrective measures adopted by San Diego APCD. EL RAP members had been making and selling non-flats at all times between mid-1985 and mid-1987. This was with the full knowledge and permission of the districts and ARB and, until June 24, 1987, by which time a petition for review was time-barred, the apparent acquiescence of EPA.

In summary, even if judicial review had been available to challenge the prior state law violations, such review would not have been meaningful, as required by the due process clause.

C. The Rule Amendments Were Voidable From Inception And Neither Approvable Nor Enforceable By EPA.

EL RAP believes that a related point, not explicitly advanced by Vista, supports a grant of certiorari. Where a state court has invalidated a state air pollution control rule, a plan revision based thereon is not enforceable in federal court. *Sierra Club v. Indiana-Kentucky Electric Corp.*, 716 F.2d 1145, 1148 (7th Cir. 1983) ("since a valid [rule] was never submitted, EPA's adoption of [the invalid rule] cannot be given effect . . .").[10]

The same rule should apply whether the invalidity of the state rule is determined before EPA review, or after it. The timing of the invalidation of the state rule should not be determinative. If the state agency initially acted in violation of state law, that basic error at the front end of

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10 Accord: *New Mexico Environmental Improvement Division v. Thomas*, 789 F.2d 825, 833 (10th Cir. 1986); *cf. U.S. v. Ford Motor Co.*, 814 F.2d 1099, 1103 (6th Cir. 1987) (holding *Sierra Club* to be distinguishable where state regulators change their views and enter a consent decree purporting to vacate and modify the plan as of its compliance date).

the process should preclude federal enforcement at the back end. Otherwise, state and federal authorities may engage in a race, with state courts rushing to rule, or EPA rushing to prosecute, more rapidly than would otherwise be the case. And if the timing is irrelevant, as EL RAP contends, then an appropriate time and place to test the state law claims—here, the only practical time and place—is in the federal enforcement action.

If, as shown above, a state rule adopted in violation of state law is neither approvable nor enforceable by EPA, then the circuit conflict correctly identified by Vista, and its resolution by this Court, become even more significant.

CONCLUSION

For these reasons, certiorari should be granted.

Respectfully submitted,

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REPLY TO BRIEF IN OPPOSITION

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The Government attempts to persuade this Court, as it persuaded the Ninth Circuit, that this case is nothing more than a routine administrative dispute unworthy of attention. But it is precisely this cavalier approach toward the imposition of staggering civil fines that warrants this Court's review. Each of the three questions presented relates to the integrity of the judicial process afforded to petitioner. Each of those three questions, in addition, was incorrectly decided below, and conflicts with other rulings. Accordingly, this Court should grant review.

1. Preclusion of Judicial Review

The Government first attempts to defend the Ninth Circuit's ruling precluding Vista from challenging the validity of the very regulations being enforced in this proceeding. *See* Opp. Br. 10-16. The Government, like the Ninth Circuit, relies on Section 307(b)(2) of the Clean Air Act, which precludes judicial review at the enforcement stage of any action "with respect to which review could have been obtained" when the regulation was first adopted. 42 U.S.C. § 7607(b)(2). Such reliance is wholly misplaced.

Analysis of this issue must start from the premise that it is an extraordinary step for Congress to deny a defendant an opportunity to challenge the validity of a regulation being enforced against him. This Court has upheld such a drastic restriction only once, in *Yakus v. United States*, 321 U.S. 414 (1944). That case, however, arose in the unique context of a wartime challenge to an emergency price control regulation. Even assuming that *Yakus* was correctly decided, it cannot reasonably be construed as an all-purpose seal of approval for provisions that preclude defendants from challenging the validity of regulations at the enforcement stage. To the contrary, courts must construe such preclusion provisions narrowly, and resolve any doubts against preclusion. *See, e.g., Adamo Wrecking Co. v. United States*, 434 U.S. 275, 282-85 (1978); *id.* at 289-91 (Powell, J., concurring); *cf. McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991).

The Ninth Circuit displayed no such restraint, and instead broadly held that Section 307(b)(2) precluded all of Vista's challenges to the validity of the SIP. *See* Pet. App. 36a. Vista had "ample opportunity," the Ninth Circuit declared, to challenge the SIP at the time it was initially adopted by the EPA. *Id.* That holding is manifestly incorrect.

For the past quarter century, it has been settled that the EPA cannot consider challenges based on economic and/or technological infeasibility in deciding whether to adopt a SIP. *See Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976). It necessarily follows that such challenges (1) cannot be raised in a proceeding for direct review of such a decision, and thus (2) are not precluded in any subsequent enforcement proceeding. *See, e.g., Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839, 845 (7th Cir. 1975); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 172-73 (6th Cir. 1973). This Court noted, but did not expressly decide, this point in *Union Electric*. *See* 427 U.S. at 268 n.18.

The Ninth Circuit thus erred, and brought itself into conflict with these other circuits, by holding without qualification that all of Vista's challenges to the SIP were precluded because the were not raised in a pre-enforcement proceeding. *See* Pet. App. 36a. The Ninth Circuit drew no distinction between challenges based on economic and/or technological feasibility and other challenges. The Government now attempts to defend that holding on the ground that none of Vista's challenges to the SIP involved issues of economic and/or technological infeasibility. *See* Opp. Br. 10-12. That is simply not so.

From the beginning of this litigation, Vista challenged the validity of the SIP on numerous grounds, including several relating to economic and/or technological feasibility issues outside the EPA's statutory ken. It is important to note, in this regard, that "economic and technological infeasibility" is not a term of art, but rather a phrase used by this Court in *Union Electric* to describe considerations that the EPA is not authorized to consider in evaluating a SIP. *See* 427 U.S. at 256. These considerations encompass (1) the economic costs

imposed on one or more affected entities, or (2) the technological adjustments that would have to be made to conform to the prescribed environmental norms. *See, e.g., Buckeye Power,* 481 F.2d at 167.

It is abundantly clear that several of Vista's challenges to the California SIP fell into one or both of these categories, and hence should not have been precluded in this enforcement proceeding. Indeed, the Government's own recitation of Vista's challenges includes at least two that on their face involved economic or technological feasibility. *See* Opp. Br. 11 n.6.

First, Vista challenged the SIP on the ground that the local pollution-control agencies had failed to "'assess and duly consider the economic impacts [of the VOC limits], as required by law.'" Opp. Br. 11 n.6 (quoting Pet. C.A. Br. 29, *United States v. Vista Paint Corp.*, No. 92-55160 (9th Cir.)). In support of that challenge, Vista specifically relied on *Western Oil & Gas Ass'n v. Air Resources Bd.*, 691 P.2d 606, 608 (Cal. 1984), the very case on which it now relies for the proposition that "a local air quality district must assess and duly consider the economic impact of its standards." Pet. 9.

Second, Vista challenged the SIP on the ground that the local pollution-control agencies had engaged in improper "crystal-ball gazing" by setting standards that were infeasible in light of the current state of technology. Opp. Br. 11 n.6 (quoting Pet. C.A. Br. 29-30, *United States v. Vista Paint Corp.*, No. 92-55160 (9th Cir.) (in turn citing *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973)). Despite these two economic and technological feasibility defenses, the Ninth Circuit broadly held that Vista was precluded from challenging enforcement of the SIP by its previous failure to challenge adoption of the SIP. *See* Pet. App. 36a.

Vista challenged that holding in an interlocutory petition for *certiorari*. *See* Pet. for a Writ of Cert., *Vista Paint Corp. v. United States*, No. 92-2026 (filed 6/21/93). The Government filed an opposition to that petition arguing solely that the

petition was untimely on the theory that Vista's petition for rehearing in the Ninth Circuit had been untimely. *See* Mem. in Opp., *Vista Paint Corp. v. United States*, No. 92-2026 (filed 8/5/93). Vista addressed that argument in its reply brief. *See* Reply Brief, *Vista Paint Corp. v. United States*, No. 92-2026 (filed 8/13/93). Over one month later, the Government filed a "Supplemental Brief" acknowledging the possibility that Vista's petition had been timely filed and for the first time addressing Vista's arguments on the merits. This Court denied the petition shortly thereafter. *See* 510 U.S. 826 (1993). The Government, in other words, sandbagged Vista by getting in the last word. It is disingenuous, to say the least, for the Government now to chide Vista for "not tak[ing] issue at that time with the government's characterization of its invalidity defenses as not being based on technological or economic feasibility," Opp. Br. 12—a characterization made for the first and only time in a belated supplemental brief to which Vista had no opportunity to respond.

The Government also suggests in the alternative that Vista could have raised a pre-enforcement challenge to the SIP based on economic or technological infeasibility by labeling it a challenge to the validity of the SIP under state law. *See* Opp. Br. 15 (citing 42 U.S.C. § 7410(a)(2)(E)). Such semantic sleight-of-hand, however, is untenable. Any challenge based on economic or technological infeasibility must ultimately be rooted in law—neither the EPA nor the courts can adjudicate a challenge based on free-floating considerations of economic or technological feasibility without some legal basis. This Court's holding in *Union Electric* that the EPA is not allowed to consider challenges based on economic or technological infeasibility would be entirely meaningless if such challenges could be presented under the guise of challenges to the validity of a SIP under state law. As the Seventh Circuit has explained, "a plan's technological feasibility and economic impact are not among the factors which the Administrator is obliged to consider under [42 U.S.C. § 7410(a)(2)], and . . . where a state's implementation plan satisfies the criteria set forth

therein, the statute quite specifically requires the Administrator to approve it." *Indiana & Mich. Elec. Co.*, 509 F.2d at 844. Because the EPA cannot consider a pre-enforcement challenge to a SIP based on economic or technological infeasibility, Vista should not be precluded from raising such a challenge now. The Government's argument to the contrary boils down to nothing more than "heads I win, tails you lose."

The Government finally attempts to downplay the effect of precluding Vista's validity defenses by arguing that Vista was "free to raise such issues during the penalty phase of the case in an effort to show 'good faith efforts to comply' with the VOC limits." Opp. Br. 16 (quoting 42 U.S.C. § 7413(e)(1)). That argument is meritless. It is wholly foreign to our system of justice to suggest that a defendant can be precluded from raising a defense to the imposition of liability if he is subsequently allowed to raise that defense to limit the penalty. It goes without saying that an individual or entity can suffer significant collateral injury from a finding of liability even if no penalty at all is imposed. Thus, even assuming that Vista's challenges to the SIP based on economic and/or technological infeasibility were coextensive with the company's "good faith efforts to comply" with the SIP—which is by no means clear—that point would in no way justify the preclusion of Vista's challenges to the validity of the SIP at the liability stage. Vista was forced to defend itself in this proceeding with its hands tied behind its back. The Clean Air Act does not require, and the Constitution does not tolerate, any such result.

2. Improper Burden of Proof

The Government next attempts to defend the ruling below that there is no burden of proof in a proceeding to determine the amount of a statutory penalty under the Clean Air Act. *See* Opp. Br. 16-20. That ruling, however, makes no sense, as there is *always* a burden of proof in any proceeding (like a penalty proceeding under Section 113(e)(1) of the Clean Air Act) that requires a court to determine certain facts. In addition, the

ruling below only exacerbates the prevailing confusion among the lower federal courts on this important issue.

The notion, embraced by the courts below and now the Government, that there is no burden of proof in a Clean Air Act penalty proceeding is manifestly erroneous. The whole point of such a proceeding, and the whole reason that the Ninth Circuit reversed the District Court's grant of summary judgment in the first round of this litigation, *see* Pet. App. 38a-39a, is for the court to make factual findings as a predicate for application of the statutory penalty factors. The fact-finding process necessarily calls for a burden of proof: either the Government or the defendant must bear the burden of proving that certain facts more likely than not are true. The court's subsequent obligation to weigh all those facts and balance the various statutory penalty factors in no way negates the existence of this threshold burden of proof.

There is, moreover, no reason to think that the Clean Air Act represents a departure from the bedrock norm in our legal system that the burden of proof in civil cases rests squarely upon the plaintiff—here, the Government. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511-12 (1993); *Addington v. Texas*, 441 U.S. 418, 428 (1979). Accordingly, where (as here) the Government seeks to exact a penalty for a violation of the Act, it bears the burden of proving that the penalty is justified. The defendant does not bear the burden of proving that the penalty is not justified. *See, e.g., United States v. Midwest Suspension & Brake*, 824 F. Supp. 713, 735 n. 30 (E.D. Mich. 1993), *aff'd*, 49 F.3d 1197 (6th Cir. 1995); *Student Public Interest Research Group v. Monsanto Co.*, 18 Envtl. L. Rep. 20,999, 1988 WL 156691, at *12-*16 (D.N.J. 1988).

The Government attempts to sidestep this division of authority by asserting that any error in the allocation of the burden of proof in this case was harmless. *See* Opp. Br. 20. That assertion is misguided as a matter of law and fact. As an initial matter, it is settled that a misallocation of the burden of proof is a structural error that infects an entire trial and

accordingly is not susceptible to harmless-error review. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 279-82 (1993); *Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991). In any event, it is simply not true that "the district court would have reached the same conclusion" regardless of the burden of proof. Opp. Br. 20. As Vista detailed in its briefs below, the misallocation of the burden of proof may well have tipped the scales on several critical issues, including (1) financial impact of the fine, (2) good-faith efforts to comply, and (3) financial benefit from non-compliance. The Government's unvarnished (and counterintuitive) speculation that the burden of proof did not affect the penalty imposed is baseless and unwarranted.

3. Trial by Affidavit

The Government finally attempts to defend the District Court's decision to dispense with oral testimony and instead conduct a summary "trial by affidavit" with respect to the penalty factors under the Clean Air Act. *See* Opp. Br. 20-23. Contrary to the Government's characterization, however, Vista does not contend that the District Court simply "abused its discretion" in its conduct of the penalty trial. *Id.* at 20. Rather, Vista contends that the District Court violated the straightforward command of Rule 43(a) of the Federal Rules of Civil Procedure that "in all trials" the testimony of witnesses shall be taken "in open court." A district court simply has no "discretion" to disregard that mandate by compelling litigants to present their direct evidence by affidavits. *See, e.g., Murphy v. Tivoli Enters.*, 953 F.2d 354, 359 (8th Cir. 1992) ("Rule 43(a) presupposes that a witness will be physically present in the courtroom to give testimony orally.").

The Government attempts to defend the decision below on the ground that Rule 43(a) is trumped by Rule 611(a) of the Federal Rules of Evidence, which authorizes district courts to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence." That attempt is unavailing. "It is a commonplace of statutory construction that the specific governs the general," *Morales v. Trans World*

Airlines, Inc., 504 U.S. 374, 384-85 (1992), and the general provisions of Rule 611(a) in no way purport to override the specific command of Rule 43(a). The Government's approach, which would create a conflict between these two rules and render Rule 43(a) a dead letter, is simply untenable.

In addition, the Government fails to explain away the conflict between the decision below (which reflects settled Ninth Circuit law, *see, e.g., In re Adair*, 965 F.2d 777, 779-80 (9th Cir. 1992) (*per curiam*); *Phonetele, Inc. v. AT&T*, 889 F.2d 224, 232 (9th Cir. 1989), *cert. denied*, 503 U.S. 914 (1992)) and decisions from other circuits construing Rule 43(a). In particular, the Government fails to distinguish a line of cases holding that Rule 43(a) prohibits trial courts from conducting trials by affidavit. *See* Pet. 19-20 (citing, *inter alia*, *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 313 (7th Cir. 1986) (Easterbrook, J.), and *Lebeck v. William A. Jarvis, Inc.*, 250 F.2d 285, 294-95 (3d Cir. 1957)). The Government contends that *Walton* is distinguishable because the Seventh Circuit there concluded that the Rule 43(a) error was harmless. *See* Opp. Br. 23. But that contention misses the point: *Walton* set forth a rule of law diametrically opposed to the rule of law set forth below, and whether the particular error at issue in *Walton* was prejudicial is immaterial. The Government's further observation that *Walton* "did not consider the relationship between Rule 43(a) . . . and Rule 611(a)," Opp. Br. 23, only underscores the sheer implausibility of construing the one rule to override the other. Similarly, the Government cannot reasonably distinguish *Lebeck* on the ground that the case involved a jury, rather than a bench, trial, because Rule 43(a) draws no such distinction.

In the final analysis, this is the kind of elementary procedural issue about which there should be no confusion in the bench and bar. In this era of increasingly crowded dockets, it is undoubtedly tempting for busy trial courts to require litigants to present their case by simultaneous affidavits. *See, e.g.*, Hon. Charles Richey, *A Modern Management Technique*

for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to Be Submitted in Written Form Prior to Trial, 72 Geo. L.J. 73, 73-74 (1983) (advocating use of this device). But this understandable desire for judicial efficiency cannot be allowed to supplant the traditional right to present live witness testimony, a hallmark of Anglo-American justice. At the very least, this should not be an issue on which the law is unclear. Accordingly, this Court should grant review to clarify whether Rule 43(a) still means what it says.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for writ of *certiorari*, this Court should grant the petition.

Respectfully submitted,

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